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THE

MANITOBA REPORTS

VOLUME XXII.

CONTAINING

REPORTS OF CASES DECIDED IN THE

COURT OF KING'S BENCH

AND

COURT OF APPEAL

FOR

MANITOBA.

EDITOR :

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REPORTS OF CASES

DECIDED IN

The Court of King's Bench

AND

The Court of Appeal

FOR

MANITOBA

COLE v. CROSS.

Before MACDONALD, J.

Vendor and purchaser—Agreement of vendor to convey—Incumbrance—Caveat filed after certificate of title under Real Property Act—Costs.

The defendant agreed to sell the land in question to the plaintiff's assignor and, upon payment of the purchase money, to convey the land "to the purchaser by a transfer under the Real Property Act or a deed without covenants other than against incumbrances by the vendor," and the purchaser agreed to accept the title of the vendor and that he should not be entitled to call for the production of an abstract of title or proof or evidence of title or any deeds, papers or documents relating to the said property other than those then in the possession of the vendor.

The defendant had a clear certificate of title for the property, except that there was indorsed upon the duplicate sent to him a caveat filed by one Latzke after the issue of the original certificate.

Held, that the plaintiffs were not entitled, upon tender of the balance of the purchase money, to demand from defendant a transfer free from the caveat of Latzke, for which the defendant was in no way responsible.

The defendant was deprived of the costs of the action although he succeeded, because, in his statement of defence, he said that he did not admit the alleged assignment to the plaintiffs, which was equivalent to denial of such assignment although he was well aware of it.

DECIDED: 8th January, 1912.

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Statement.

THE plaintiffs, Francis E. Cole and George Anderson, sued W. H. Cross, their action being one for specific performance of an agreement with respect to the purchase and sale of certain lands in Saskatchewan. After the agreement had been entered into, the defendant filed a caveat against the lands, claiming that another party had made a claim with respect to them, and contended that he was obliged to deliver title, and he asked the Court to decide as to whether he was to respect the claim of the plaintiffs, or those of the Saskatchewan claimants. The plaintiffs contended that the Saskatchewan proceedings had nothing whatever to do with Cross delivering title to them; they had paid the balance of the purchase money due under the agreement into court, and this had been handed over to Cross, and they asked that he be directed to give them the title which he agreed to supply them with.

M. G. Macneil for plaintiffs.

J. B. Hugg and *A. M. S. Ross* for defendant.

MACDONALD, J. David Wark was the registered owner of section 27 in township 5 and range 5 west of the second meridian in the Province of Saskatchewan.

On the security of this section of land he borrowed money from the defendant Cross.

When the money thus borrowed became due Wark and the defendant made an agreement whereby the defendant was to take the land and accept the same in satisfaction of Wark's indebtedness to him and from thenceforth the defendant became the owner of the said land and registered as such and received a duplicate certificate of title from the Assiniboia Land Registration District at Regina in the Province of Saskatchewan on the 31st day of December, A.D., 1907. Within an hour after the issue of this duplicate certificate a caveat was filed against the land by one John C. Latzke and this caveat was en-

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dorsed upon the duplicate certificate forwarded to the defendant.

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On the 17th day of December, 1907, the defendant entered into an agreement with the said Wark whereby he agreed to sell and "the said Wark agreed to purchase the said lands and upon payment of the purchase money, the vendor agreed to convey the said lands to the purchaser by a transfer under the Real Property Act or a deed without covenants other than against incumbrances by the vendor," and it was further agreed that the purchaser accepts the title of vendor to the said lands and shall not be entitled to call for the production of any abstract of title or proof or evidence of title or any deeds, papers or documents relating to the said property other than those which are now in the possession of the vendor.

The benefits of this agreement extended to the executors, administrators and assigns of the vendor and purchasers.

On the 21st day of January, 1908, Wark, the purchaser, assigned his agreement with the defendant Cross, and all his interest therein and in the said lands, to the plaintiffs who, thereafter, made payments to the defendant according to the terms of the said agreement and made a tender of the final payment, demanding at the same time a transfer (to which they were entitled under the terms of the agreement) but demanding such transfer free from the caveat referred to, and, the defendant being unable to comply with such demand, the plaintiffs bring this action seeking specific performance of the agreement of sale assigned to them, and also claiming damages in the event of the defendant being unable to specifically perform his agreement.

The caveat filed by Latzke was followed by an action brought in the Supreme Court of Saskatchewan against Christian Albright, D. W. Harvey, Wm. F. Hepburn, David Wark, Wm. H. Cross and, subsequently, Francis E.

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Cole and George Anderson were made parties defendants, and by that action the plaintiffs sought to set aside the conveyance made by them to the defendant Wark and asked for an order directing the defendant Cross to re-convey the said lands to them, charging the said defendants Cross and Wark with a knowledge of the fraudulent representations under which they alleged they conveyed the said property to the defendant Wark.

Before the trial of this action in Saskatchewan the plaintiffs abandoned as against the defendant Cross, but continued as against all the other defendants, and upon the case being heard the action was dismissed as against all the defendants, thus settling and putting at rest the rights of the defendants Wark and Cross and establishing the title of the latter free from the caveat endorsed upon his certificate of title.

The defendant Cross can now transfer the property to the plaintiffs and there will be an order that he do so convey forthwith.

The remaining question is that of costs. Counsel on both sides admitted that the case came down to trial principally to settle who is entitled to the costs.

Now it seems to me that under the circumstances the plaintiffs acted in an unreasonable manner, even were they entitled to receive from the defendant a transfer free from the caveat; the defendant was in no way responsible for such caveat; he got a transfer from his co-defendant Wark with the latter's certificate of title free from encumbrances, and he was justified in his assurance to the plaintiffs that the title was all right and that they would be safe in taking over the agreement.

But were the plaintiffs entitled to a transfer such as they demanded?

Under the terms of the agreement I am of the opinion that they were not. The agreement provides for a transfer under the Real Property Act, or a deed without coven-

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ants other than against incumbrances by the vendor, and the purchaser accepted the title of the vendor to the said lands. The property was under the Real Property Act, and all that the plaintiffs were entitled to was a transfer and not to a title free from the caveat for which the defendant was in no way responsible, and furthermore, considering the fact that the plaintiffs here were also defendants in the Saskatchewan action and that the property would be tied up in their own hands, the reasonable thing for them to do would be to let matters stand until the Saskatchewan action was disposed of. The plaintiffs are, to my mind, clearly not entitled to costs.

Now the question is, should the defendant by reason of the unreasonable conduct of the plaintiffs be awarded costs against the plaintiffs?

Had the defendant by his statement of defence not denied the assignment of David Wark to the plaintiffs, for that is practically what he did by his allegation that "The defendant does not admit the alleged assignment of David Wark to the plaintiffs," I would be disposed to allow him costs and, although this is not in reality the issue between the parties, yet it is made an issue when I think it should not have been. The other paragraphs of his statement of defence show, however, his willingness to transfer the lands subject to the caveat, or to convey the same when the person entitled thereto shall have been ascertained, but I am led to the conclusion, from his denial of the plaintiffs' rights under the assignment from Wark, that he is not entitled to costs. There will, therefore, be no costs to either party.

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RE PROVENCHER ELECTION.

BARKWILL v. MOLLOY.

Before RICHARDS, J.A.

Election petition—Dominion Controverted Elections Act, ss. 19,87—Preliminary objections—Time for filing—Application to enlarge time after lapse of time fixed by statute—Practice.

1. The filing of preliminary objections to an election petition under the Dominion Controverted Elections Act is only an interlocutory proceeding as distinguished from the filing of the petition itself and the bringing on of the trial; and, if the objections are not filed within the five days allowed by section 19 of the Act, the time for filing may be extended under section 87, although the application is not made until after the lapse of the five days.

Alexander v. *McAllister*, (1896) 34 N. B. R. 163; *Re Bothwell Election*, (1882) 9 P. R. 485; *Re Burrard Election*, (1896) 32 C. L. J. 638; *Wheeler* v. *Gibbs*, (1879) 3 S. C. R. 374, and *Stratton* v. *Burnham*, (1909) 41 S. C. R. 410, followed.

Re Glengarry Election, (1888) 14 S. C. R. 453; *In re North Perth Election*, (1909) 18 O. L. R. 661; *Re Lisgar Election*, (1891) 20 S. C. R. 1, and *Re Burrard Election*, (1901) 31 S. C. R. 459, distinguished.

McDougall v. *Davin*, (1896) 2 Terr. L. R. 417, not followed.

2. If the respondent files his preliminary objections after the five days without first applying for an extension of the time, he runs the risk of an order being made to remove them from the file; but, if the respondent applies for the extension after the petitioner moves to strike out the objections because filed too late, and the Judge thinks he should have allowed the extension if applied for in time, the proper course is to order that, upon payment of the costs of the petitioner's motion, the objections do stand as properly filed.

Eaton v. *Storer*, (1882) 22 Ch. D. 91, followed.

DECIDED: 8th January, 1912.

Statement. SUMMONS by petitioners calling on respondent to show cause why the preliminary objections should not be struck out, because they were filed after the five days allowed by the statute.

H. P. Blackwood for petitioners cited *Re Coles and Ravenshear*, 23 T.L.R. 32; *Barker* v. *Palmer*, 8 Q.D.B. 9; *Re North Perth*, 18 O.L.R. 661; *Purcell* v. *Kennedy*, 14 S.C.R. 453; *Stratton* v. *Burnham*, 41 S.C.R. 410; *King* v. *Davenport*, 4 Q.B.D. 402; *McDougall* v. *Davin*, 2 Terr. L.R. 417; *Smith* v. *Kay*, 7 H.L.Cas. 750; *Jorden* v. *Money*, 5 H.L.Cas. 185; *Barnhart* v. *Greenshields*,

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Argument.

9 Moo. P. C. 18; *Lane* v. *Jackson*, 20 Beav. 538; *Lefeunteum* v. *Beaudoin*, 28 S.C.R. 94; *Chowdry* v. *Chowdry*, 3 Moore Ind. App. 347, and *Kastor* v. *Coleman*, 11 O.L.R. 262.

A. B. Hudson for respondent cited *Re Bothwell Election*, 9 P.R. 485; *Stratton* v. *Burnham*, 41 S.C.R. 410; *Wright* v. *Wright*, 13 P.R. 268; *Eaton* v. *Storer*, 22 Ch. D. 91; *Wilkes* v. *Maxwell*, 14 M.R. 599; *Lane* v. *Jackson*, 20 Beav. 535; *King* v. *Stewart*, 32 S.C.R. 483; *Alexander* v. *McAllister*, 34 N.B.R. 163; *Re Sunbury and Queen's Election*, 35 N.B.R. 457, and *Re Burrard Election*, 32 C.L.J. 638.

RICHARDS, J.A. Barkwill and Gagnon filed a petition under the Dominion Controverted Elections Act, R.S.C. 1906, c. 7, against the return of the respondent, John Patrick Molloy, as member elect for the Dominion Constituency of Provencher. The petition was served on the respondent at the Town of Morris, where he resides. Seven days later he filed preliminary objections to it.

Sections 19 and 87 of the Act are: "19. Within five days after the service of the petition and the accompanying notice, the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge against the petition or the petitioner, or against any further proceeding thereon, and shall, in such case, at the same time, file a copy thereof for the petitioner, and the Court shall hear the parties upon such objections and grounds, and shall decide the same in a summary manner." "87. The Court shall, upon sufficient cause being shown, have power, on the application of any of the parties to a petition, to extend, from time to time, the period limited by this Act, for taking any steps or proceedings by such party."

No rules have been made by Manitoba judges affecting proceedings under the Dominion Controverted Elections Act.

The petitioners took out a summons to show cause why the preliminary objections should not be struck out be-

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cause they were filed after the five days allowed by section 19.

On the return the respondent's affidavit stated that he had been told by the deputy sheriff, who served the petition upon him, that he had ten days from service within which to take action; and he gave that as his reason for not coming to Winnipeg and consulting his solicitor until the seventh day, that on which the preliminary objections were filed. The deputy sheriff's affidavit, filed by the petitioners, denied his having made any such statement. I do not think it necessary to decide which is correct. The respondent evidently, for some reason, thought he had the ten days within which to take his first proceeding. There is nothing in the papers served upon him to show when he should take any proceeding.

From the report in *McDougall* v. *Davin*, 2 Terr. L.R. 417, it appears that, in a similar case, Mr. Justice Richardson struck out preliminary objections, which were filed after the closing of the Clerk's office on the fifth day after the service of the petition. I think I must assume that he also held that he had no power to extend the time. An appeal was taken to the Supreme Court of Canada, whose judgment is reported in 27 S.C.R. at p. 215. They held that an appeal did not lie, as the case was not one within section 50, now section 64, of the Controverted Elections Act, the section giving the right of appeal in the case of preliminary objections. The Judges, both in the Supreme Court and in the judgment reported in 2 Terr. L.R., 417, stated that they refrained from expressing an opinion upon the merits of the judgment of Mr. Justice Richardson.

It was held in *Re Glengarry Election*, 14 S.C.R. 453, that, after the six months allowed for the bringing on the petition for trial have elapsed, if no order extending the time has been made within that six months, an application to extend the time is made too late. That decision

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was discussed by Dávie, C. J., in the Burrard Election case, which I shall refer to later. He pointed out that the decision disallowing an application (made after the time has expired) to extend the time for trial, rests upon reasons of public policy and on the ground that the Legislature never could have intended that an election petition should be permitted to hang on indefinitely; that six months was to be the ordinary limit, and that it could only be extended for good cause shown within that six months, or within some extension of the time for trial, granted before the time had expired.

I agree with Davie, C. J., that that decision is not applicable to such a matter as this. Letting the six months expire, without getting further time to bring on the trial, is allowing the whole proceeding to die by lapse of time. When the six months have elapsed, without an order extending the time and without going to trial, the petition has lapsed, and there remains nothing before the Court in respect of which an extension can be granted. It is similar to the proceeding under the old practice, where the plaintiff was out of Court unless he filed his declaration within one year after the defendant had appeared to the writ.

The same principle applies to the decision in *King* v. *Davenport,* 4 Q.B.D. 402, where an order to extend time for delivery of statement of claim was held invalid, because the action was at an end, by effluxion of time, on the day before the order was made.

In *Re North Perth,* 18 O.L.R. 661, cited by the present petitioner, a petition delivered to the Registrar at his house, and after his office hours, on the last day allowed by the Act for presenting the petition, was held to have been delivered too late, because section 13 of the Act says that "Presentation of a petition *shall* be made by delivering it at the office of the Clerk of the Court, during office hours, or in any other prescribed manner," and no other manner had been prescribed.

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A motion under section 87 to extend the time for presenting the petition was refused in that case. The learned Judge held that section 87 applied only to interlocutory proceedings and not to the presentation of a petition—that is, to the initiation of the proceedings under the Act. He held, in effect, that until a petition had been presented, and unless it had been so presented within the time provided by the Act, the Court had no jurisdiction of any kind under the Act.

Section 63 of the then Dominion Controverted Elections Act, R.S.C. 1886, c. 9 (section 86 of the present Act), provided that, until rules were made by the Judges of the several Courts of each Province, the principles, practice and rules on which election petitions, touching the election of members of the House of Commons in England, were on 26th May, 1874, dealt with, should be observed by the Courts and Judges.

The English rules, thus in force, require the petitioner to leave with the Clerk, at the time of filing the petition, a copy of the petition, to be sent to the returning officer.

In *Re Lisgar Election,* 20 S.C.R. 1, and in *Re Burrard Election,* 31 S.C.R. 459, it was held that the failure to leave the copy with the clerk within the time allowed for presenting the petition was fatal to the proceeding. In each of these cases the petition was, for the above reason, dismissed, or ordered to be taken off file.

In those cases the judges differed greatly in their views. But I take it that, in each case, the reason for the decision was that the delivery of the copy within the time allowed was as essential a preliminary to the acquiring of jurisdiction by the Court as was the presentation of the petition itself, and that, therefore, the proceedings necessary to give jurisdiction had not all been taken within the time limited.

It will be seen that section 12 says "the petition *must* be presented not later than thirty days after," &c.

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In each of the above cases the action, petition, or proceeding either had not been initiated within the time peremptorily limited by the law for its commencement, or had expired before the time of the attempted extension, and so was no longer before the Court.

I am unable to find that proceedings, to be taken after commencement of the action and during its course, are subject to the rules applicable to such cases as the above.

In England it was enacted by Order VIII, rule 7, of the County Court Rules, 1875, that "the summons in an action brought to recover lands shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof." In *Barker* v. *Palmer,* 8 Q.B.D. 9, cited by the present petitioner, it was held that, because the summons had been delivered to the bailiff only thirty-nine days before the return, the County Court Judge had not power to try the action, though the summons was served on the defendant thirty-eight days before the return day.

That case was decided on the peremptory language of the rule. It is analogous to a case where, though notice of trial is properly given, the case itself is not entered for trial the number of days that the law prescribes, before the Court sitting.

In *Alexander* v. *McAllister,* 34 N.B.R. 163, a motion was made to set aside the preliminary objections, on the ground that a copy thereof, for the petitioner, had not been filed with the clerk of the Court, as required by the section in question (then section 12, now section 19). It was held in that case that, by taking subsequent proceedings before he applied to strike out the preliminary objections, the petitioner had waived his right to apply to strike them out. Several of the Judges held that the failure to furnish the copy was, at most, only an irregularity, and none of them expressed a contrary opinion.

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That holding is not an *obiter dictum*. It is essential to the decision. If the objections were a nullity the petitioner's subsequent proceedings would not have vitalized them. A void proceeding is not given life by waiver.

The above decision was subsequent to *Re Lisgar Election* mentioned above. Apparently that case was considered, as it is referred to in the judgment of Barker, J.

I take it that the filing of a copy of the preliminary objections for the petitioner is as necessary under section 19 to compliance with that section, as the delivery of a copy of the petition itself was, in *Re Lisgar* and *Re Burrard,* to compliance with the English rule. The failure to file the copy of the objections stands, therefore, according to the decision of the New Brunswick case, as I understand it, in the same position as would the failure to file the objections themselves.

Assuming that decision, and those of the Supreme Court in *Re Lisgar* and *Re Burrard,* to be correct, the difference seems to be that, in the case of the initiation of proceedings, no jurisdiction accrues to the Court till full compliance with the preliminaries giving jurisdiction, while, in the case of the copy of the objections, it affects only an interlocutory proceeding in the action, and becomes merely an irregularity.

In *Re Bothwell Election Petition,* 9 P.R. 485, the petitioner moved for an order for the examination of the respondents, claiming that the case was at issue, because of the preliminary objections not having been filed until after the expiration of the five days. The motion came before Mr. Justice Osler, who refused the order until after the final disposal of a rule *nisi* which, he said in his judgment, had been granted to set aside the preliminary objections; but, although he refused on that ground, he said: "The preliminary objections which have been filed in this case, although presented after the expiration of five days from the service of the petition,

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RICHARDS, J.A.

are not a void proceeding, inasmuch as the time for their presentation may be extended by a Judge, sec. 43, and that, by analogy to ordinary practice, even after the expiration of the term originally fixed by statute: *Wheeler* v. *Gibbs,* 3 S.C.R. 374. They are at most irregular."

Section 43, above referred to, is in chapter 10 of 37 Vic. It became section 64 in chapter 9, R.S.C. 1886. It is now section 87.

Though the above quoted language is, perhaps, an *obiter dictum,* it is that of a Judge whose views are entitled to great consideration. I cannot find any report of a decision on the rule nisi that the learned Judge refers to.

Then, in *Re Burrard Election Petition,* reported in 32 C.L.J., 638, it was held by Davie, C. J., that the time for filing preliminary objections could be extended beyond the five days, and that, following *Wheeler v. Gibbs,* mentioned above, such extension could be applied for after the five days had elapsed.

Section 18 of the Act says that the petition, &c., shall be served within ten days after the day of presentation, &c., "or within such longer time as the Court - - - allows."

There is no provision that such longer time may be applied for after the expiration of the ten days. But, in *Stratton* v. *Burnham,* 41 S.C.R. 410, it was held that the extension might be granted after the ten days had expired.

The only direct decisions that I can find on both points in question are those of Richardson, J., and Davie, C.J., which contradict each other. But the views of Osler, J., and the New Brunswick judges agree with that of Davie, C. J., as to the filing after the five days being only an irregularity, and those of the Supreme Court in

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Stratton v. *Burnham,* and of Osler, J., support his opinion, that an extension of time may be granted, though applied for after the lapse of the time allowed as of course by the Act. I think, therefore, that the weight of authority is in favor of the respondent's contention.

The language of section 19 is permissive. It does not say that the objections may not be filed after the five days; and there is nothing in it saying, or implying, that the right is absolutely gone at the end of that period. Section 87 seems to me to give power to extend the time.

In view of the importance to a respondent of the right to file preliminary objections and have them passed upon, I do not think I ought to hold that all right to file such objections, and all power to grant leave to file them, expired with the five days from the service of the petition.

The respondent, on being served with the summons, gave notice of an application for leave to extend the time for filing the preliminary objections. I think that, had that been the only motion before me, and had the same material been before me as I have had on these two applications, it would have been my duty to extend the time.

Though the language of section 19 is permissive and does not, in words, definitely limit the respondent to the five days, as a period after which he may or may not file the objections without leave of the Court, I think that, reading it with section 87, I should hold that the intention of the Act is that, if he desires to file objections after that period, he should apply for an order extending the time. If that is correct, it follows that, if he files them after the five days, and without such order, he incurs the risk of such filing being declared irregular, and of its being ordered that the objections be removed from the files of the Court. I do not feel certain that I ought not to take that course in this case. But as I would, as just intimated, have allowed them to be refiled

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RICHARDS, J.A.

during the extension of time applied for by the respondent, the taking off and refiling would cause useless costs and trouble.

I think the rule to be applied on that point is that in *Eaton* v. *Storer,* 22 Ch. D. 91. There, an order for further time to reply was refused by a Judge, the plaintiff showing no reason why he had not filed his pleading during the time allowed by the rules of the Court. The plaintiff, nevertheless, delivered a replication, which the defendant returned as being irregular. The plaintiff then appealed from the order refusing him time. I quote from the judgment of the Court of Appeal, delivered by Sir George Jessel, M. R.:—"According to the usual practice of the Court the plaintiff's application ought to have been granted by the Vice-Chancellor. The plaintiff was out of time, and in that case, if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken, of a motion to dismiss for want of prosecution, the usual course is to give the plaintiff time to take the next step upon his paying costs, which is a sufficient punishment, and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay. - - Our order now will be that the delivery of the reply - - shall stand, the plaintiff paying the costs of the application to the Vice-Chancellor, but having his costs of the appeal."

There will be an order, therefore, that the respondent pay to the petitioners their costs of this motion which I fix at thirty-five dollars, and that the preliminary objections stand as properly filed.

As the respondent's action has caused the petitioners a serious loss of time, the order is to provide that the time within which the trial of the petition shall be commenced be extended till the ninth day of July, A.D., 1912, inclusive of that date.

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RE PROVENCHER ELECTION NO. 2.

Before PERDUE, J.A.

Election petition—Dominion Controverted Elections Act, ss. 6, 9A, 12, 14, 16—*Security for costs—Affidavit verifying petition—Payment of expense of publishing notice of the petition—Status of petitioner—Proof of list of voters—Provincial lists.*

1. Only one sum of $1000 need be deposited by the petitioners as security for costs under section 14 of the Dominion Controverted Elections Act, although they have made the returning officer a party to the petition and claimed relief against him as well as against the respondent.
2. Unless the petitioner is shown to have been completely ignorant of the contents of the petition which he has verified by his affidavit, the latter should be held to be sufficient: *Re Lunenburg Election*, (1897) 27 S. C. R. 226, and in any event, where there are two petitioners and, as to one of them, no such objection is raised, the affidavit of that one is sufficient.
3. It is not incumbent on a petitioner to furnish the returning officer with money in advance to pay the expense of publishing the notice of the petition in a newspaper as required by section 16 of the Act, although the petitioner is liable for such expense.
4. As the Dominion Elections Act makes the Provincial lists the foundation of the Dominion lists, if the former are produced from the custody of the proper officer and proved to have been the official lists in force, no objections as to the regularity of these lists, by reason of alleged non-compliance with requirements of the Provincial statute, should be entertained or inquired into on the trial of a preliminary objection as to the status of a petitioner under the Dominion Controverted Elections Act.

The petitioners' names were on the certified lists of voters for the electoral district which were compiled and arranged by the committee of Judges in Winnipeg to be transmitted by them to the Clerk of the Crown in Chancery under sub-section 10 of section 9A of the Act. The Clerk of the Crown in Chancery, however, in order to save time, requested the committee to hand the certified lists in Winnipeg to a Mr. McGrath who had been sent from Ottawa by the King's Printer to take charge of the printing of the lists in Winnipeg. The lists were then printed in Winnipeg under Mr. McGrath's supervision, and it was not until after the election was over that the certified lists reached the office of the Clerk of the Crown in Chancery.

Held, notwithstanding this irregularity, that the certified list prepared by the County Court Judges for transmission as above, and

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now produced from the custody of the Clerk of the Crown in Chancery, was the original and legal list of voters for the electoral district, and that, as the names of the petitioners appeared upon it, they had established the fact of their right to vote at the election. 1912

DECIDED: 7th February, 1912.

Statement.

A petition was filed by John H. Barkwill and Paul Gagnon against the return of John Patrick Molloy as a member for the electoral district of Provencher in the House of Commons of Canada. A number of preliminary objections to the petition were filed, but on the argument these were all narrowed down to four, which may be briefly stated as follows:

1. That the petitioners did not furnish the security for costs prescribed by the Dominion Controverted Elections Act, R.S.C. 1906, c. 7, nor in the manner prescribed by the Act.

2. That the petitioners were not aware of the contents of the petition when they signed the same, nor were they when they made the affidavits filed therewith.

3. That the petitioners did not furnish or pay the Registrar of the Court or the returning officer the costs, expenses and charges necessary for the publication of the notice of the petition by reason whereof the same was not published by the returning officer in the electoral district within the time or in the manner provided by the Act.

4. That the petitioners were not persons who had a right to vote at the election and were not candidates at the election.

H. P. Blackwood for petitioners cited *Pease* v. *Norwood,* L.R. 4 C.P. 235; *Re Hamilton Election,* 10 C.L.J. 170, and *Re Morris,* 6 W.L.R. 742.

A. B. Hudson for respondent cited *Pease* v. *Norwood,* L.R. 4 C.P. 235; *Dansereau* v. *Bernard,* 26 L.C.J. 233; *Re West Simcoe,* 1 Elec. Cases 128; *Re Marquette,* 11 M.R. 381; *Alexander* v. *McAllister,* 34 N.B. 163; *Wright* v. *Skinner,* 5 Dow. 92; *Baltimore* v. *St. Clair,*

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Argument.

52 S.E.R. 660; *Cook* v. *Delagardin*, 2 Cyc. 25; *Re Lisgar Election*, 20 S.C.R. 1; *Re Burrard Election*, 31 S.C.R. 459; *Re North Dufferin*, 4 M.R. 280; *Re Emerson*, 4 M.R. 287, and *Re Laverandrye*, 4 M.R. 514.

PERDUE, J.A. In regard to the first point raised it was argued that, because the returning officer had been made a party to the petition and relief had been claimed against him, the petitioners should have furnished an additional $1,000 as security for the returning officer's costs. I think it is clear from section 14 of the Controverted Elections Act that the $1,000 deposited as security is for the purpose of securing payment of the costs and expenses, not only of the member whose election or return is complained of, but also the costs of the returning officer, if his conduct is complained of. This, I think, clearly appears from paragraphs (*b*) and (*c*) of section 14. By section 9 of the Act a returning officer whose conduct is complained of is, for all the purposes of the Act, except the admission of respondents in his place, to be deemed to be a respondent. I think that the security was sufficient and that the objection should be over-ruled.

The principal grounds upon which the second objection was based were that Gagnon, one of the petitioners, was not aware of the contents of the petition, had no knowledge of the facts alleged and had no information in regard to them, and that, therefore, his affidavit was not true and was not in compliance with the Act. Counsel for the petitioners had put Gagnon in the witness box and had asked him questions as to his having read over the petition before making the affidavit, with the object of showing that Gagnon knew the allegations in the petition at the time he made the affidavit and that when he made it he had reason to believe the allegations to be true. Counsel for the respondent was allowed to cross-examine the witness as to the fact of his having received information as to the truth of the

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allegations and that he believed them. The cross-examination showed that Gagnon's information was very defective in regard to what the petition contained or the charges set forth in the various paragraphs, or even the meaning of what was charged. It cannot, however, be said that he was completely ignorant or without information as to the contents of the petition and he made statements as to his knowledge of some of the alleged corrupt acts charged in the petition.

I think that I must hold the affidavit was sufficient on the authority of the *Lunenburg case,* 27 S.C.R. 226. In any event there was no such objection to the affidavit made by the other petitioner, Barkwill, and by section 5 of the Act a petition may be presented to the Court by one person who had a right to vote at the election to which the petition relates. I therefore over-rule this objection.

Under the third objection it was urged on behalf of the respondent that the evidence showed that the petitioners had not left with the Registrar of the Court or forwarded to the returning officer money to pay the expense of inserting a notice in a newspaper, published in the district, that a petition had been presented against the return of the sitting member, pursuant to section 16 of the Controverted Elections Act. That section requires the clerk of the court to send such a notice by mail to the returning officer and it is then the duty of the returning officer to insert the notice once in a newspaper published in the district. The costs of inserting such a notice must be borne by the petitioner: Imperial Election Petition Rules, No. 12; *Rogers on Elections,* vol. II, p. 678; *McPherson's Election Law,* 1065. There is nothing in the Act or in the rule (which is in force here) compelling the payment to the returning officer of the expense of inserting the notice as a preliminary to the insertion of the notice by him. It would not be con-

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venient that the rule should make such payment a condition precedent as the amount to be paid in such a case would be uncertain. The returning officer, as a matter of fact, did not forthwith insert the notice in a newspaper as required and such notice was not inserted until a considerable time after the election petition had been filed. In his evidence he explained that the cause of the delay was that he had met with an injury which rendered him incapable of performing his duties. He stated that the non-payment of the money had nothing to do with his neglect to insert the notice. I think, therefore, that this objection also fails.

In respect of the last objection, it was urged on behalf of the respondent that it appeared from the evidence that the voters' list upon which the election took place had not been prepared in accordance with the law, and that, therefore, the petitioners had failed to show that they were persons who had a right to vote at the election to which the petition related, and that they were not, nor was either of them, a candidate at the election.

On behalf of the petitioners very much evidence was put in to prove the compiling, revising and bringing into force of the Provincial election lists, and a number of objections were urged by the respondent as to the regularity of these lists by reason, as it was alleged, of non-compliance with several statutory requirements. The Dominion Elections Act makes the provincial lists the foundation of the Dominion lists: section 6. I do not think that, on an inquiry such as this, I would be justified in entertaining any objection as to the regularity of the provincial voters' lists. These were produced from the proper officers and were proved to be the official lists in force. I do not think I should go behind that.

It is contended by the respondent that, in the preparation of the voters' lists for the purposes of the election in question, the provisions of the Dominion Elections Act

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were not complied with, in that there were several departures from the express requirements of the Act; that the voters' list compiled for the Electoral District of Provencher was therefore invalid, and that the petitioners, who relied upon the list as establishing their right to vote, had failed to prove that they had a right to vote at the election. The following facts appeared from the evidence put in by the petitioners:—

In 1911, when it was learned that a general election was to take place, the Clerk of the Crown in Chancery at Ottawa, in order to save time, requested the Clerk of the Executive Council at Winnipeg to hand the certified copy of the provincial voters' lists to Judge Myers, Judge of the County Court of Winnipeg, instead of transmitting them to the Clerk of the Crown in Chancery in accordance with section 12 of the Dominion Elections Act. This was to enable the County Court Judges at once to proceed to define the polling divisions and distribute amongst the polling divisions the names of the voters entitled to vote in each electoral district, pursuant to section 9A, sub-section 9, of the Act, as amended by 7 & 8 Edw. VII, c. 26. Judge Myers handed the certified copy to the committee of judges appointed to define the polling places and to make the distribution of names. The committee completed their work and made a statement showing the limits of the polling divisions, and a copy of the lists of electors as distributed amongst the polling divisions, all duly certified. But, instead of transmitting the lists to the Clerk of the Crown in Chancery by registered mail as required by section 9A, sub-section 10, the committee, acting on instructions from the Clerk of the Crown in Chancery, handed them, in Winnipeg, to a Mr. McGrath, who had been sent from Ottawa by the King's Printer to take charge of the printing of the lists in Winnipeg. The lists were then printed in Winnipeg under Mr. McGrath's supervision,

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and in the month of October, following the holding of the elections, the certified copy of the lists and the statement showing the polling divisions came to the office of the Clerk of the Crown in Chancery for the first time.

It is argued that sub-section 10 of section 9A is imperative, the words being: "It shall be the duty of each such committee forthwith after the completion of such distribution to transmit to the Clerk of the Crown in Chancery by registered mail a statement and description showing the limits of the polling divisions so defined and established, together with a copy of the lists of electors as so distributed among the said polling divisions, certified under the hands of the members of the said committee, and the provisions of sections 13 and 14 of the Dominion Elections Act shall apply to such certified copy." It is urged that the list must be in the hands of the Clerk of the Crown in Chancery before it becomes, under section 14, "the original and legal list of voters," etc.

A printed list of voters for the electoral district in which the petitioners reside was put in evidence. This purports to bear the imprint of the King's Printer, and the names of the petitioners appear upon it as voters. By section 18 of the Dominion Elections Act any voters' list purporting to bear such imprint "shall be deemed to be for all purposes an authentic copy of the original list of record in the office of the Clerk of the Crown in Chancery." This makes the imprint *prima facie* evidence of authenticity. It is argued, however, that there was not, as the evidence shows, any original list of record in the office of the Clerk of the Crown in Chancery when the list was printed, and, therefore, that the printed list cannot be taken to be an authentic copy of something that did not exist when it was printed. A question might be raised as to whether, having regard to the facts of this case, the lists were printed under the superintendence of the King's Printer in accordance with the provisions

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of the Public Printing and Stationery Act, R.S.C. 1906, c. 80, having particular regard to sections 16 and 32. The lists were not printed at the Government establishment at Ottawa where, by section 16, the work is to be done. They were printed in Winnipeg under the supervision of a person sent by the King's Printer, not under the superintendence of the King's Printer himself. If the lists were not printed under the superintendence of the King's Printer in accordance with law, then his imprint would not be sufficient authentication of them.

I think that the certified list made by the County Court Judges to be transmitted to the Clerk of the Crown in Chancery is the original and legal list of voters for the electoral district. The fact that it was not transmitted by mail but was, at the request of the Clerk of the Crown in Chancery, handed to Mr. McGrath, as his representative, and held by him for the purpose of being printed, does not detract from its validity as the actual list of voters for Dominion purposes compiled by the Judges from the Provincial lists. The fact that it was not actually in the hands of the Clerk of the Crown in Chancery, but in the hands of his representative, does not appear to me to be material. There was nothing to be done to the list by the Clerk of the Crown in Chancery. He could make no changes in it. He could not add anything to it or take anything from it. It was his duty on receiving it to deliver it to the King's Printer to be printed. That it was printed in Winnipeg instead of at Ottawa does not affect the list itself. I think the list compiled by the County Court Judges and produced from the possession of the Clerk of the Crown in Chancery is a valid list of the voters entitled to vote in the electoral district. The names of the petitioners appear as voters on the list and this establishes the fact that they had the right to vote at the election.

All the preliminary objections should be over-ruled. The costs will be to the petitioners in any event of the cause.

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CARON v. BANNERMAN.

Before PRENDERGAST, J.

Costs—Taxation of costs—Appeal from taxation—King's Bench Act, Rules 684 and 968—Extraordinary circumstances—Inherent power of Court to remedy case of hardship.

There is no right of appeal, under Rule 684, or any other Rule of Court, from a taxation of costs between party and party in respect of items which have not been objected to in accordance with Rule 968: *Snowden* v. *Huntingdon*, (1887) 12 P. R. 248; but the Court, under its inherent power over procedure, may grant relief from any manifest hardship to any party due to circumstances for which he is in no way responsible.

The plaintiff's action, which was for the cancellation of an agreement of sale, was dismissed with costs, and the defendant's counterclaim for specific performance of the agreement was allowed with costs. On the taxation the plaintiff was not represented, as his solicitor was seized with a sudden and very grave illness preventing him from attending or instructing any person for him; and the taxing Master allowed defendant two sets of costs of $300 each, besides disbursements including $1524 for a medical witness from Toronto and other witness fees objected to on the appeal.

Held, that whilst the Court could not review the taxation on the merits, it was proper under the circumstances to make an order vacating the certificate of taxation and giving the plaintiff time to prepare and put in his objections to the taxation under Rule 968.

DECIDED: 17th January, 1912.

Statement

THE plaintiff Lister agreed to sell land to the defendant who filed a caveat. Lister then brought this action to set aside the caveat. Defendant counterclaimed and asked for specific performance of the agreement. During the progress of the action Lister was committed to a hospital for the insane, and Caron, the inspector of public institutions, was appointed committee of his estate, and made a plaintiff.

The action was tried before Metcalfe, J., who dismissed same with costs and gave judgment for the defendant on his counterclaim with costs.

Subsequently a motion was made on behalf of the plaintiff by way of appeal from the certificate of the taxing officer and the taxation of the costs of the

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defendant, under the judgment herein, against the following items:—

Fee advising on evidence	$ 10.00
Fee advising on evidence, Mr. O' Connor	10.00
Paid Monkman witness fee, additional	28.90
Bell do	100.00
Paid Dr. Bruce Smith, expenses from and to Toronto, hotel bill and alienist fee of $100 per day from date of leaving Toronto until return there	1524.00
Paid G. H. Walker fee	10.00

and against the taxation of fee of $600 for the defendant's costs, or for an order directing the taxing officer to review the taxation and giving leave to the plaintiff to bring in objections to the taxation, or for an order disallowing the items above referred to and directing the taxing officer to alter his certificate of taxation in accordance therewith, or for such further or other order as to the Court might seem just on the following grounds:—

(1) That the taxing officer should not have allowed two items for ten dollars each for advising on evidence and that the taxing officer had no power to allow any greater fee than five dollars.

(2) On the ground that the additional witness fees paid to Monkman, Bell, Dr. Bruce Smith and G. H. Walker should not have been allowed or, if allowed, were excessive and unreasonable.

(3) On the ground that the taxing officer should not have allowed a fee of three hundred dollars for the costs of defence and a further fee of three hundred dollars for costs of counter claim.

H. Phillipps for plaintiff.

J. E. O'Connor for defendant.

PRENDERGAST, J. Solicitor for plaintiff was seized

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with a most sudden and very grave attack of illness, whereby he was rendered unable to either attend personally on taxation of the costs of the opposite party or advise anyone in his office of the same.

The taxation was proceeded with. Of course, no objection to the same could be taken on behalf of plaintiff under rule 968, and a certificate of taxation was consequently issued.

The matter was then brought before me on plaintiff's behalf on notice of motion by way of appeal as to certain items of the taxation.

This is a very exceptional case and one which may result in great hardship, and I think the plaintiff should have relief if at all possible.

There is no special rule provided under which that relief can be granted. But the inherent powers of the Court to grant relief for any manifest hardship due to circumstances for which the party is no way responsible, and over which he had no control whatever, are surely wide enough to meet such a case as this.

The question is: what form should this relief take?

I do not think I should entertain the appeal in the sense of reviewing the taxation on the merits. I should not disregard in this respect, even in this case, the well established rule (*Holmested & Langton,* 1396, and *Snowden* v. *Huntington,* 12 P.R. 248) that there can be no appeal except as to such items of taxation as are objected to in the manner provided by rule 968,—and no such objections were taken.

It will be in order, in my opinion—without imputing any irregularity in the taxation proceedings (and in fact such proceedings are shown to have been perfectly regular), but owing to the very special circumstances—to vacate the certificate issued which stands in the way of the plaintiff now taking his objections, and to allow him time to take the same in proper form.

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The certificate of taxation will be vacated, and the plaintiff will have three days to formulate his objections under said rule, the same to be limited to such items as are set out in the notice of motion.

There will be no costs of the present application.

RE ST. BONIFACE CHARTER.

Before ROBSON, J.

Practice—Summons to quash by-law—Grounds of application should be stated—Amendment—St. Boniface Charter, 7 & 8 Edward VII, c. 57, s. 517—Application by summons or notice of motion.

1. Under section 517 of the St. Boniface Charter, 7 & 8 Edw. VII, c. 57, an application to quash a by-law of the City for illegality is properly made by summons and not by notice of motion.

2. Although the statute does not expressly provide that the grounds intended to be set up should be stated in the summons, yet, to avoid injustice, such requirement should be implied. In this case the omission to state the grounds in the summons was by inadvertence, and permission was given the applicant, upon alleging plausible grounds and upon proper terms as to costs, to amend and re-serve the summons, making it returnable at such a date as would allow the ten clear days notice required by the section.

Re Peck and Township of Ameliasburgh, (1888) 12 P. R. 664, followed.

DECIDED: 5th February, 1912.

Statement.

IN this matter a summons was issued calling upon the City of St. Boniface "to show cause why by-law No. 800 of the said City of St. Boniface should not be quashed."

On the return of the summons counsel for the City raised the objection that the summons for quashing the by-law did not set out any of the grounds on which it was proposed to ask that the by-law be quashed.

H. P. Blackwood for the City of St. Boniface.

A. Dubuc for the applicant.

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ROBSON, J. There can be no question that a party whose proceeding is impeached for alleged illegality has an absolute right *ex debito justitiæ* to notice of the grounds of attack in due time to enable him to meet the attack. To avoid injustice it should be implied in section 517 of the St. Boniface City Charter that the grounds shall be stated in the summons. By inadvertence the summons in this case omits a statement of the grounds upon which the applicant proceeds. In *Re Peck & Township of Ameliasburg*, 12 P.R. 564, although there was an irregularity in the period of notice, Street, J., did not dismiss the application, but retained it and required that proper notice be given. It seems to me that in the present case I should, if the applicant alleges adequate grounds, amend the summons and require it to be re-served making it returnable again at such a date as will allow of ten days' notice. This course may save the repetition of work and the expense of another application. There is no lapse of any limitation period or other circumstance to prejudice the respondent. Should adequate grounds not be suggested there would, of course, be the dismissal of the summons. The respondent must be protected in the matter of costs.

The objection was taken that the proceeding should not have been by summons but by notice of motion, and the case mentioned was cited in support. That case, however, went upon a state of legislation which does not exist here. The objection is absolutely answered by the fact that the St. Boniface City Charter is later and special legislation, and, therefore, its directions must be followed in preference to those contained in the King's Bench Act.

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REX v. MALI.

Before PRENDERGAST, J.

Criminal law—Criminal Code, s. 778, s-s 3—Summary trial of indictable offence—Jurisdiction—Consent of prisoner to be

It is sufficient to show jurisdiction in the magistrate at the summary trial of an indictable offence if the conviction contains the statement that the prisoner consented to be tried summarily, without setting out on the face of it, or anywhere on the record, the language used by the magistrate in informing the accused of his right to elect as prescribed by sub-section 3 of section 778 of the Criminal Code.

The consent to be tried summarily is the essential element in the jurisdiction and, if that is stated, it should be presumed that it was regularly and properly obtained in the absence of any evidence to the contrary.

DECIDED: 8th February, 1912.

Statement.

APPLICATION on return of summons for *habeas corpus* and *certiorari* in aid.

P. E. Hagel for applicant cited *Rex* v. *Crooks*, 17 W.L.R. 560; *Re Royston*, 15 Can. Crim. Cas. 100; *Reg.* v. *Cockshott*, [1898] 1 Q.B. 582; *Reg.* v. *Mosier*, 4 P.R. 64; *Re Burley*, 1 C.L.J. 34; *Re Warner*, 1 C.L.J. 16; *Reg.* v. *Reno*, 4 P.R. 281; *Reg.* v. *Gibson*, 2 Can. Crim. Cas. 302; *Paley on Convictions*, 7th ed. 786; *Rex* v. *Hong Lee*, 15 Can. Crim. Cas. 39; *Reg.* v. *Sears*, 17 C.L.T. Occ. N. 124, and *Rex* v. *Barnes*, 21 M.R. 357.

R. B. Graham, Dep. Atty. Gen., for the Crown cited *Rex* v. *Crooks*, 17 W.L.R. 560; *Reg.* v. *Peterson*, 6 M.R. 311; *Re McEwen*, 44 C.L.J. 122; *Re Sproule*, 12 S.C.R. 140, and *Rex* v. *Pepper*, 15 Can. Crim. Cas. 314.

PRENDERGAST, J. The grounds urged for the applicant are:—

1. That the said magistrate exceeded his jurisdiction in convicting and sentencing said prisoner.

2. That the conviction does not show on its face a strict compliance with the statute, section 778 of the

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Criminal Code of Canada, by showing on the face of the conviction that the magistrate imparted to the prisoner the necessary information as required by the statute to give the magistrate jurisdiction to try and convict the prisoner.

3. The warrant of commitment does not show on its face a strict compliance with section 778 of the Criminal Code of Canada, by showing on the face of the warrant of commitment that the magistrate imparted to the prisoner the necessary information as required by the statute, to give him jurisdiction to convict and sentence the prisoner.

As to the first ground, it is too vague and general to be dealt with, and I dismiss it for that reason.

As to the second ground. The objection, which is directed to the conviction only, does not go far enough; it should be directed to the whole record. For if any part of the record shows that the section in question was complied with, that is sufficient and the conviction should stand. Even considering the matter, conformably with the agreement between the parties, as if the writ of *habeas corpus* and that of *certiorari* in aid had issued and been returned, I should say that the conviction only was before me, as that is all that is attacked and not the rest of the record. I think that the application could well be dismissed on that ground alone,—that the rest of the record, not before me, might show that the section was complied with, although the conviction does not.

But, as a matter of fact, the record contains this entry: "The prisoner consents to be tried summarily." This consent of the prisoner to be tried summarily clearly refers to, and was evidently meant to be in compliance with, the requirements of section 778, s-s. 3. The consent is the essential thing; it is that which gives jurisdiction, and it is here stated to have been given. It is urged for the prisoner that the record does not

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state that, before giving his consent, he was addressed by the magistrate in the words prescribed by s-s. 2 or words to the same effect. I do not think it is necessary that the record should state this. The magistrate should be presumed to have accepted the prisoner's consent in the proper manner and only after the necessary preliminary requirement of addressing him in the manner provided by the Code was complied with. That it is absolutely necessary that the magistrate should so address the prisoner, is over-abundantly established; but still the fact remains that this is only a preliminary leading to the prisoner's election, which is the essential element, and, on proper evidence of the consent having been given, a presumption is established that the preliminary was complied with as it should have been.

It is to be noted that the accused does not in any way allege that the said statutory requirements were not most strictly observed in every particular, but simply that the conviction (and I have allowed the objection to cover the whole record) does not so state. This distinguishes the present case from *Rex* v. *Howell,* 19 M.R. 317, and *Rex* v. *Walsh,* 7 O.L.R. 149, which came up as stated cases showing on their face what proceedings had actually been followed before the magistrates; and also from *Rex* v. *Crooks,* 17 W.L.R. 560, where the application was supported by affidavits that the said statutory provisions had not been followed.

As to the third ground, I will also dismiss the same for the reasons first set out herein, and also under section 44 of the Penitentiaries Act, with which the precept issued herein, to serve as a warrant of commitment, strictly complies.

The application is dismissed.

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IN THE COURT OF APPEAL.

GUNN v. CANADIAN PACIFIC RY.

Before RICHARDS, PERDUE and CAMERON, J J.A.

Negligence—Bailment—License to keep horses in stable for reward—Liability for injury to horse caused by defect in building—Landlord and tenant.

By an arrangement made with defendants the plaintiffs were permitted to use a stable of the defendants to keep and feed their horses in. The defendants supplied the feed and charged 50 cents per head per day for this and the stable accommodation. The plaintiffs' man looked after the horses and fed them, but there was no one on behalf of the plaintiffs in charge of the horses during the night. The stable was at the same time used by the defendants for horses in transit during shipment over the railway and no particular stalls were allotted for the plaintiffs' horses. One night one of the plaintiffs' horses, a heavy draft animal, broke through the flooring of the stall it occupied and was so injured that it died.

The defendants' agent in charge of the stable had requested the plaintiffs' stableman to report to him any defects in the flooring he might notice and had several times made repairs on receiving such reports, but there was no agreement by the plaintiffs that they would make such reports.

Held, that the relationship of the parties was either that of bailor and bailee or licensor and licensee, and not that of landlord and tenant, and that the defendants were under a duty to have the stable reasonably fit for its purpose, and so were guilty of negligence in not keeping it in proper repair and were therefore liable to the plaintiffs in damages for the loss of their horse.

Searle v. *Laverick*, (1874) L. R. 9 Q. B. 122; *Brabant* v. *King*, (1895) A. C. 632; *Stewart* v. *Cobalt*, (1909) 19 O. L. R. 667; and *Francis* v. *Cockrell*, (1870) L. R. 5 Q. B. 501, followed.

RICHARDS, J.A., dissented.

DECIDED: 12th February, 1912.

Statement. THE plaintiffs were contractors for building a subway and used a number of their horses at that work.

The defendants owned a stable near where the subway was being built, and used it only for the purpose of stabling horses in transit on their railway. They are not livery, or boarding, stable keepers, in any sense.

The plaintiffs, finding, apparently, that there would be

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room for their horses in the defendants' stable, arranged with them to use such portion of the stable as they needed for their horses. They also were allowed by the defendants to have a telephone in the building and to use an office, apparently without charge for the office. It was agreed that the plaintiffs should furnish the bedding for their own horses, and should bed them and do all the work of looking after them, including feeding them; but they were to be at liberty to use feed which the defendants had on hand for their own purposes. They were to pay for this 50c per day for each horse. Bills were rendered from time to time by the defendants to the plaintiffs for 50c a day per horse, and in those bills it was charged as "stabling" the horses. The above, however, were the facts as to how the horses were handled and fed.

There was no evidence that anyone remained in the building at night. The above arrangement began in May and went on until December. In December a heavy horse, owned by the plaintiffs, while occupying a stall in the stable under the above arrangement, was injured by his foot going through the flooring of the stable. This floor was about three and a half feet above the ground. The horse was so injured from his leg going down through the break, and apparently from his struggles to extricate himself, that he died.

The plaintiffs brought this action in the County Court of Winnipeg, claiming that the defendants were boarding the horses for the plaintiffs and that, owing to a defect in the flooring and to the negligence of the defendants in allowing the stable to remain in an unsafe condition, the flooring gave way and the horse fell through and died as a result. The action was tried before Judge Dawson, who non-suited the plaintiffs. The plaintiffs then appealed to this Court.

W. L. Garland for plaintiff, appellant, cited *Brabant* v. *King*, [1895] A.C. 632. and *Oliphant on Horses*, 241.

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Argument.

W. H. Curle for defendants, respondents, cited *Brown* v. *Trustees,* 23 O.R. 599; *Broggie* v. *Robins,* 15 T.L.R. 224; *Tredway* v. *Machin,* 20 T.L.R. 726; *Bell on Landlord and Tenant,* 45; *Woodfall on Landlord and Tenant,* 144, and *Marshall* v. *Toronto,* 1 O.L.R. 319.

RICHARDS, J.A. The evidence in this case is very vague in some respects in which it should be clear, and it is difficult to get at exactly what the facts were. No one was called on behalf of the plaintiffs to state what the original arrangement was. There seems to be no doubt that Dickson the superintendent of the defendants' stock yards, who had supervision over the stable, was rather nervous about its condition. He says, however, that he informed Mr. Ewart Gunn fully as to the stable, but later he says that his recollection of having spoken to Mr. Gunn was not so very clear, but he knows that, when the horses were put in, he told the man, who had charge of them for the plaintiffs, about the condition of the stable, and that he was nervous about it, and he asked him, if at any time he noticed any defect in the floor, to report it to him, so that he could have it repaired. He says that this man did so report to him at times, and that, in every such case, repairs were made.

The man who had charge of the horses for the plaintiffs denies having reported the need of any repairs, or there having been any repairs required, while he was there. He does not, however, deny having been told by Dickson his opinion of the floor or that Dickson asked him to report defects.

It is very difficult to find a precedent for such a case as this. The law referring to livery stables, inn-keepers and agisters cannot apply, it seems to me, because the horses were not in any way entrusted to the defendants, but remained entirely under the control and care of the plaintiffs, and there was therefore no bailment.

It is not exactly similar to a case of letting lodgings

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because the evidence apparently does not show that any definite portion of the stable was constantly used by the plaintiffs, or was set apart for their use.

The plaintiffs were apparently mere licensees. Whether they were licensees for hire or not, I find it difficult to understand; but it seems to me that the meaning of the evidence is that the 50c a day was a charge merely for the food eaten by the horses. I judge this from the fact that that is said to be what the railway company charged for feeding the horses which they stabled there while in transit. The fact that no charge was apparently made for the use of the office by the plaintiffs I think slightly corroborates this.

Perhaps the nearest position that one can think of to that which existed between the plaintiffs and the defendants, with regard to this stable, is that of a tenancy at will from day to day. If that were the position between them, I take it there would be no liability on the part of the defendants. But assuming it to be that the plaintiffs were not tenants at will but were licensees, whether for hire or not, the fact is that they occupied parts of this stable daily for some seven months, with differing numbers of horses, and I think they had ample time to see for themselves the condition of the stable. Then, too, there is the uncontradicted evidence of Dickson that he warned the man in charge to be careful and report to him if any repairs were needed. It seems to me that a man so put in charge by the plaintiffs was their agent to receive notice of matters affecting the stable. There is no evidence, too, that the plaintiffs themselves did not know its condition. I can not but think that, before the accident occurred, they knew it and took all risks. If so, is seems to me immaterial whether they were, as to the use of the stable, licensees for hire or bare licensees. There is no evidence that the place, where the horse's leg went through, was, before the accident, known to

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either party to be weak, or that there was any reason known to the defendants, and not to the plaintiffs, to suspect that it was dangerous.

The limit of liability in such a case seems to me not greater than that stated by Mr. Justice Harlan in *Bennett* v. *Railroad Co.*, 102 U.S. at page 580, where he says: "the owner or occupier of land who by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them."

If that is the limit then there is no liability here, if I am right in the view that the plaintiffs should be held, on the evidence, to have known before December the condition of the stable.

In my opinion the learned trial Judge was right in his finding.

I would dismiss the appeal with costs.

PERDUE, J.A. The plaintiffs are contractors and were engaged in the construction of the McPhillips Street subway in the City of Winnipeg. They used a number of horses upon the work and, by an arrangement made with the defendants, the horses were stabled in a stable belonging to the defendants, the latter charging the plaintiffs fifty cents per day per head for the stabling and feed of the horses. Although the defendants supplied stable accommodation and feed for the horses, the plaintiffs' men attended to and fed them, but there was no one on behalf of the plaintiffs in charge of the horses during the night. The stable in question was at the same time used by the defendants for horses in transit while the same were detained in Winnipeg during their shipment over the defendants' railway. After the plaintiffs had for some time stabled their horses in defend-

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ants' stable under the above arrangement, one of their horses broke through the flooring of the stall it occupied and received such injuries that it died. The present action was brought in the County Court of Winnipeg to recover damages for the loss of the horse and the learned County Court Judge entered a non-suit.

The defendants, besides denying their liability, set up that the stable was leased to the plaintiffs who undertook to repair or to immediately notify the defendants of any repairs that might be required, that the plaintiffs did not keep the premises in repair and neglected to notify the defendants of any defect in the flooring.

It is clear that the relationship of landlord and tenant did not exist between the parties. During all the time the stable was made use of for the plaintiffs' horses the defendants were also using it for stabling other horses in their charge. The evidence shows that no particular stalls were set apart for the plaintiffs' horses. The defendants' official in charge of the stable said that the defendants utilized every portion of it for horses in transit during the time plaintiffs' horses were there. The defendants remained in possession and occupation of the stable and merely supplied accommodation for the plaintiffs' horses.

An attempt was made to prove an agreement with the plaintiffs that they would report to defendants' agent in charge any defects noticed in the floor of the stable and that the agent would have them repaired. The evidence failed to prove any such agreement with the plaintiffs. The defendants' agent in charge of the stable requested the plaintiffs' stableman to report any defects he noticed, but there was nothing in the nature of an agreement to report defects shown in the evidence.

I think the transaction between the parties in regard to the stabling of the horses was in the nature of a bailment for a reward. The fact that the plaintiffs had

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charge of the horses and fed them while in defendants' stable does not seem to me to be material in dealing with the question of the responsibility assumed by the defendants. They agreed, for a valuable consideration, to furnish stable accommodation and feed for the plaintiffs' horses. Whether we regard the arrangement as a bailment for a reward or as a license to the plaintiffs for a valuable consideration, the duties cast upon the defendants are very much alike.

If the defendants were bailees for hire they were bound to take reasonable care that the building in which the horses were stabled was in a proper state so that the animals might be reasonably safe: *Searle* v. *Laverick,* L.R. 9 Q.B. 122; *Brabant* v. *King,* [1895] A.C. 632, 640.

If, upon the other hand, we regard the transaction as a license to the plaintiffs to make use of the defendants' stable and fodder for the purpose of sheltering and feeding their horses, in consideration of a money payment, the defendants impliedly warranted that the stable was reasonably fit and safe for the purpose: *Francis* v. *Cockrell,* L.R. 5 Q.B. 501; *Stewart* v. *Cobalt,* 19 O.L.R. 667. In these cases persons were injured owing to the unsafe condition of structures which they were invited to use and for the use of which they paid fees.

The rule laid down in *Francis* v. *Cockrell* by Montague Smith, J., that the structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so, applies also as against the possessor of a structure to which it is intended that persons should entrust their property animate or inanimate: *Pollock on Torts,* 8th ed. 512; *Lax* v. *Corporation of Darlington,* 5 Ex. D. 28; *The Moorcock,* 14 P.D. 64; *Searle* v. *Laverick, supra,* at page 129. The judgments in *Francis* v. *Cockrell* in the Exchequer Chamber show that a

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case like the present may be based either upon a breach of an implied contract or upon a breach of a duty imposed on the defendant to have the building reasonably fit for its purpose: pp. 510, 511, 513, 514, 515.

The learned County Court Judge did not give a decision in writing or intimate upon what grounds he entered a nonsuit. It was stated by counsel upon the argument of this appeal that the learned Judge expressed, at the trial, a leaning towards the view that a tenancy had been created. If he decided the case upon that ground it was unnecessary for him to come to any conclusion upon the evidence as to the condition of the stable or the care taken by the defendants to keep it in a safe condition.

The evidence shows that the floor of the stable was constructed of a single layer of two-inch planks. Under the floor there was an open space of three or four feet. The horse in question was a heavy animal weighing some 1650 pounds. There is uncontradicted evidence that such a floor is not sufficient or safe for a stable in which heavy horses are kept. The defendants' agent in charge of the building admitted that he knew the floor was not safe. He said: "I never felt very safe, heavy horses being continually in there, you know, wearing the plank, knowing that there was an opening underneath." He asked the plaintiffs' man to report to him any defects he noticed in the floor so that they might be repaired. Defects were reported and these were repaired by being planked over.

It was urged on behalf of the defendants that, because the plaintiffs' man noticed and reported defects in the stable floor, the plaintiffs should be fixed with knowledge of its condition and should be taken to have assented to the risk. This contention is, I think, completely disposed of by the judgment in *Brabant* v. *King*, [1895] A.C. at page 641. Lord Watson, in giving the judgment

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of the Court, said: "It would be a very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim *volenti non fit injuria* have no bearing whatever upon the point."

It is reasonably certain from the evidence that a floor such as was put in this stable would, with the constant use to which it was subjected, develop, and that the floor in question did develop, defects and weaknesses which would endanger the horses placed in the stable. Upon the defects first becoming known to the defendants or their agent in charge, it was their duty to have put the floor in a safe condition and not to have waited for other defects to appear with the intention of patching them as they did appear. The defect which occasioned the death of the plaintiffs' horse made its first appearance when it actually caused the injury. The defendants, through their agent in charge of the stable, had had ample warning of the unsafe condition of the floor and should have taken steps to make it safe for the purpose for which it was used so that horses stabled therein, for the keep of which the owners were paying, might be reasonably safe.

I think the nonsuit should be set aside and a verdict entered for the plaintiffs for $250. The plaintiffs are entitled to the costs in the County Court, including the usual counsel fee, and to the costs of this appeal.

CAMERON, J.A. The plaintiffs bring this action to recover the value of a horse killed by injuries due to its falling through the floor of a stable belonging to the defendants. According to one of the plaintiffs the

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contract was this: "We put the horses in there and they were to charge us 50 cents a day for them each, we were to do the feeding and they were to supply the feed." According to the bills rendered and paid the number of the horses varied from time to time and even from day to day. Plaintiffs had a man who looked after the horses and their feeding. They had also a time-keeper at the stables and a telephone. The man in charge of the horses says he fed the horses and cleaned out the stable and that he was there all the time during the day, but that no one was there at night. This occupation of the premises lasted several months. Dickson, the defendant's agent in charge of their stockyards, was examined for discovery and his examination was, in part, put in on behalf of the plaintiff. He said that he looked after the stables himself and that his understanding was that the plaintiffs looked after the horses themselves. Called for the defence he said he fully informed Mr. Gunn as to the condition of the stable. He further stated in his examination for discovery and at the trial that he had told the man in charge that if he noticed any defects to report to him. He also stated that he made inspection of these stables and that he ordered repairs made during the plaintiffs' occupation. Portions of the stables not occupied by the plaintiffs' horses were used for horses in transit.

On these facts what was the relationship between the defendants and the plaintiffs? It seems to me that it was not that of landlord and tenant. No specific part or parts of the stables were reserved for the plaintiffs. It is impossible, therefore, to say that there was given to the plaintiffs exclusive possession of any part of the stables. It also seems to me that the relationship created between the parties was not that of bailee and bailor. "The chief characteristic of a bailment is the intrusting of a chattel by a person called the bailor to another person

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called the bailee for some purpose upon a contract, express or implied." *Beal on Bailments,* 7. There was here no intrusting of the horses by the plaintiffs to the defendants; on the contrary, the plaintiffs did not intrust the defendants with the care and custody of the horses, but undertook to take care of them, and did take care of them, themselves.

It seems to me that the relationship between the parties was akin to that of licensor and licensee, but whether these terms accurately determine the relationship is not important. The plaintiffs were, in effect, invited to come and stable their horses upon the defendants' premises, and the latter thereupon assumed an obligation to see to it that the premises were in a reasonably safe condition for that purpose: *Francis* v. *Cockrell,* L.R. 5 Q.B. 50; *Am. & Eng. Ency.* vol. 18, p. 1137. Did the defendants fail to exercise ordinary care and diligence to construct and maintain these stables in a reasonably safe condition for occupation by horses under the circumstances? The fact is that the horse was killed owing to a defect in the floor of the stall. *Res ipsa loquitur* and, the evidence having gone thus far, the burden of proof is shifted: *O'Brien* v. *Michigan Central,* 19 O.L.R. 349. The inference can be drawn, from the horse's injury and death under the circumstances, that the floor was defectively constructed or insufficiently maintained, and enough is proved to call for explanation by the defendants. Such explanation is not forthcoming. The defendants have not shown that the flooring of this stall was constructed and maintained so as to be reasonably safe for the purpose of stabling horses. On the contrary, Dickson, when asked: "You were of the opinion that the stable needed repair?" answered: "I never felt very safe, heavy horses being continuously in there, you know, wearing the plank, knowing that there was an opening underneath."

In the recent case of *Stewart* v. *Cobalt,* 19 O.L.R.

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667, the defendants, the owners of a rink, were held liable in damages for negligence in respect of injuries sustained by the plaintiff, who paid for a seat in the rink to see a hockey match, and who was injured by reason of the breaking of the railing of the gallery, in which he was seated, the railing not being so constructed as to resist the outward pressure of the spectators leaning forward to see what was going on below, which was to be expected and should have been guarded against. The defendants were not absolved because they had employed a competent architect. Chancellor Boyd refers in his judgment to *Francis* v. *Cockrell, supra,* and mentions that Sir Frederick Pollock (in Torts, 8th ed. p. 508) points out that the obligation resting upon the owner of a building to which the public is invited is different from the ordinary law of negligence. "The structure must be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so."

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It is to be noted that Sir Frederick Pollock refers, at p. 508, to the rule as applicable to persons having control over buildings and other structures intended for human use and occupation. But the rule is not thus restricted, as he subsequently points out. "The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier or the controller." p. 512.

In these grand-stand cases the strain that should have been foreseen and provided against was, comparatively, a sudden one and confined to a brief period. In the present case the pressure was prolonged and continuous. But I see no reason why the rule, as above stated, should be varied merely because of this difference.

On the whole, therefore, I think the plaintiffs have established the liability of the defendants and are entitled to recover.

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IN THE COURT OF APPEAL.

HUGGARD v. BENNETTO.

Before RICHARDS, PERDUE and CAMERON, JJ.A.

Gift—Husband and wife—Delivery of possession—Evidence—Interpleader.

In order to transfer the property in a chattel by a verbal gift only, there must be an actual delivery to the donee. If manual delivery is not feasible words of present gift accompanied by change of possession might constitute delivery.

The plaintiff in this interpleader issue claimed that an automobile seized by the sheriff under an execution at the suit of the defendant in this issue against her husband had been given to her by the husband, but all that was proved was that the husband had bought the machine because his wife had been ill and was not in a condition to walk, that he intended that she and the family should use it and intended to make a gift of it to her. There was no proof of any actual delivery to the plaintiff, or that any words of gift had been addressed to her by the husband after he had bought the machine.

Held, that the plaintiff had failed in the issue.

Thompson v. *Doyle*, (1896) 16 C. L. T. Occ. N. 286, followed.

Tellier v. *Dujardin*, (1906) 16 M. R. 423, and *Kilpin* v. *Ratley* [1892] 1 Q. B. 583, distinguished.

DECIDED: 19th February, 1912.

Statement. INTERPLEADER issue. Under an execution issued in a suit brought by Bennetto against Huggard, the sheriff seized an automobile, and an issue was directed to determine the right to the same. The machine was claimed by the wife of the execution debtor, who was made plaintiff in the issue.

C. P. Fullerton, K.C., and *J. P. Foley* for defendant, appellant, cited *Hardy* v. *Atkinson*, 18 M.R. 351; *Bashall* v. *Bashall*, 11 T.L.R. 152; *Re Bolin*, 136 N.Y. 180; *Cochrane* v. *Moore*, 25 Q.B.D. 57; *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Shower* v. *Pilck*, 4 Ex. 477; *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582; vol. 21 *Cyc.* 1294; vol. 14 *Am. & Eng. Encyc.* 1033; *Grant* v. *Grant*, 34 Beav. 623; *Douglass* v. *Ward*, 11 Gr. 39; *Merchants Bank* v. *Clarke*, 18 Gr. 594; *Harris* v. *Rankin*, 4 M.R.

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115; *Morton* v. *Nihan*, 5 A.R. 20; *Tripner* v. *Abrahams*, 47 Penn. St. 227, and *Osborne* v. *Carey*, 5 M.R. 237. 1912 Argument.

M. G. Macneil for plaintiff, respondent, cited *Kirchhoffer* v. *Clement*, 11 M.R. 460; vol. 25 *Am. & Eng. Encyc.*, 350; *Winter* v. *Winter*, 4 L.T.R. 639; *Tellier* v. *Dujardin*, 16 M.R. 423; *Schaffer* v. *Dumble*, 5 O.R. 716, and *McKay* v. *Bonnett*, 12 N.S.R. 137.

The judgment of the Court was delivered by

PERDUE, J.A. This is an interpleader issue in which the present plaintiff is the claimant of the chattel seized, and the defendant is the execution creditor. The defendant had obtained judgment and issued execution against J. T. Huggard, the husband of the plaintiff in the issue. Under this execution the sheriff had seized an automobile. Mrs. Huggard claimed that the automobile was her property, and the issue is to try the ownership of the machine.

The plaintiff's alleged ownership of the property seized rests wholly upon a verbal gift of it which she claims was made by her husband to her. The automobile was bought by J. T. Huggard with his own money. There was no bill of sale or other writing evidencing a transfer of it to the claimant.

In order to transfer a chattel by a verbal gift only, there must be an actual delivery of the thing to the donee: *Cochrane* v. *Moore*, 25 Q.B.D. 57, approving *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Hardy* v. *Atkinson*, 18 M.R. 351; *Re Bolin*, 136 N.Y. 180. If manual delivery is not feasible, words of present gift accompanied by change of possession might constitute delivery: *Kilpin* v. *Ratley*, [1892] 1 Q.B. 583. In Ontario it was held by the Divisional Court in *Thompson* v. *Doyle*, 16 C.L.T. 286, that, in an action where a wife claimed certain articles as a gift from her husband, the delivery of the articles as a donation should be clearly proved and that

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the uncorroborated evidence of the donee was insufficient. Boyd, C., said: "If the facts proved were equally consistent with the idea that he intended to deliver so as to be her property, and with the idea that he intended to keep as his own property, then the wife failed to make out her case." The evidence in the present case fails to show anything in the nature of a delivery of the article in question by the husband to his wife. Regarding the evidence in the most favorable light, as supporting the claimant's contention all that is proved is that Mr. Huggard bought the machine because his wife had been ill and was not in a condition to walk, that he intended that she and the family should use it and intended to make a gift of it to her. After it had been purchased it was sent to a garage and kept there when not in use. It was registered in accordance with the provisions of the Motor Vehicle Act, Mr. Huggard being the registered owner. After it was purchased the machine was used not only by the claimant but by her husband, and the family. There is no pretence that at any time an actual delivery of the machine was made to the claimant, or that any words of gift were addressed by Mr. Huggard to his wife after he had bought the machine.

The cases of *Tellier* v. *Dujardin,* 16 M.R. 423, and *Kilpin* v. *Ratley,* [1892] 1 Q.B. 583, referred to by the learned trial Judge, do not support the plaintiff's case. In each of those cases an actual gift was proved. In the first case the article in dispute, a piano, was proved to have been given to the claimant by her father as a birthday gift and to have been always treated as her property thereafter. In *Kilpin* v. *Ratley* the claimant's father, being present with her in a room where some of the furniture in question was, verbally gave her the furniture by words of present gift. He then left the house, leaving the claimant in the room and in possession of the furniture. In that case there were words of present gift and the donee was left in possession. This

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was held to take the place of a manual delivery. In the present case there were no words of present gift and no change of possession.

I think the claimant has failed to establish any property in the article in question. The appeal should be allowed with costs and a verdict should be entered for the defendant in the issue.

IN THE COURT OF APPEAL.

TIMMONS v. BROWN.

Before HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, J.J.A.

Appeal from County Court—Consent judgment.

The plaintiff sued in the County Court for $500 claimed for commission on sale of land. At the trial the verdict entered by the Judge was as follows:

"Leave to plaintiff to add count for work done and service performed. Verdict for plaintiff for $50 without costs, defendant consenting." Plaintiff's counsel was present when this entry was made, made no objection to it, and afterwards entered judgment for the $50.

Held, that the judgment should be considered to have been a consent judgment and, therefore, one from which there could be no appeal.

DECIDED: February 22nd, 1912.

COUNTY Court appeal.

Statement.

The plaintiff brought this action in the Winnipeg County Court to recover $500, which he claimed as commission for having effected a sale of the King Edward Hotel at Winnipeg Beach.

Judge Dawson, before whom the action was tried, entered a verdict for Timmons for $50.

The verdict entered was as follows:—"Leave to plaintiff to add count for 'work done and services performed.'

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Statement.

Verdict for plaintiff for $50 without costs, defendant consenting. A. Dawson, J.C.C."

Plaintiff signed judgment for $50.

Plaintiff then appealed asking to be allowed the full amount of the commission he claimed in the action.

A. Haggart, K.C., for the defendant took the preliminary objection that no appeal would lie as the judgment was a consent one: *Bicknell & Seager's Division Court Act*, 298.

B. L. Deacon for plaintiff contended that the consent given by the plaintiff, if any, must appear on the record: *Sun Life* v. *Elliott*, 31 S.C.R. 91; *Aldam* v. *Brown*, 89 L.T. Jour. 116; *Re Justin*, 18 P.R. 125; *Holmsted & Langton's Jud. Act*, 124; *Annual Practice*, 1912, vol. 2, p. 62.

THE COURT allowed the preliminary objection and dismissed the appeal, holding that, according to the entry on the record and the fact that counsel for plaintiff was present when it was made, and took the benefit of it, the judgment must be considered to have been a consent judgment and, therefore, not appealable.

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MANSFIELD V. TORONTO GENERAL TRUSTS.

Before PRENDERGAST, J.

Executors and trustees—Will—Property held by testator in trust—Costs—Specific performance—Amendment—Damages in lieu of specific performance.

The defendants resisted the plaintiff's claim for specific performance of their agreement to sell to him the land in question on the ground that they had not entered into a contract in such manner as to satisfy the Statute of Frauds, but the finding of fact by the Judge on this point was in plaintiff's favor. He held, however, that the will under which the defendants were appointed executors and trustees of the estate of the deceased testator did not give them power to sell and convey the land in question which had been held by the testator in trust. This objection had not been set up in the statement of defence, and it appeared to the Judge that the real reason why the defendants had refused to carry out the agreement was that the land was rapidly increasing in value.

Held, that, although the action must be dismissed, the plaintiff should have his costs.

Held, also, that the plaintiff's application, made at the close of the argument, to be allowed to amend, claiming damages in lieu of specific performance, should not be granted, as the defendants should not be called upon to answer such a claim without notice.

DECIDED: 22nd February, 1912.

Statement.

ACTION brought by the purchaser for specific performance of an agreement for the sale of land.

H. F. Maulson for plaintiff cited *Winn* v. *Bull*, 7 Ch. D. 32; *Crossley* v. *Maycock*, L.R. 18 Eq. 181; *Re Imperial Land Company*, L.R. 7 Ch. 587; *Rossiter* v. *Miller*, 3 A.C. 1124; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; *Bernardin* v. *North Dufferin*, 19 S.C.R. 581; *South Ireland Colliery* v. *Waddle*, L.R. 3 C.P. 463; *Andrews* v. *Calori*, 38 S.C.R. 588; *Bodwell* v. *McNiven*, 5 O.L.R. 332; *Britain* v. *Rossiter*, 11 Q.B.D. 131; *Byrne* v. *Van Tienhoven*, 5 C.P.D. 344; *Fenely* v. *Johnston*, 4 N.B. Eq. 216, and *Parker* v. *Taswell*, 2 De G. & J. 559

A. E. Hoskin, K.C., for defendants cited *Bain* v. *Fothergill*, L.R. 7 H.L. 158; *Rossiter* v. *Miller* cited in Fry on Specific Performance, p. 172; *Hussey* v. *Horne-*

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Argument.

Payne, 4 A.C. 311, and *Bohan* v. *Galbraith,* 15 O.L.R. 37.

PRENDERGAST, J. The plaintiff's contention is that certain letters which were exchanged between the parties constitute a complete agreement of purchase and sale. The defendants on the other hand contend that it was made by them an essential part of the agreement, or negotiations leading to the agreement, that the plaintiff should make his offer according to a special printed form, and that the same, if so made, was never accepted.

I find that when the defendants first made mention of an "offer form," which was in their letter of July 21st, the only conditions of sale not yet agreed upon in the correspondence carried on till then were: as to commission, as to hay grown that year, and as to what form of title plaintiff would accept and what costs defendant would bear in perfecting same.

Now, all those matters were agreed upon in subsequent correspondence which, assuming for the moment the "offer form" not to be an essential or necessary part in the negotiations, fully meets in my opinion the requirements of the Statute of Frauds.

As to the formal offer, it does not go and was not intended to go beyond what was already agreed; it says nothing of commission or hay; and, with respect to title and cost of same, the printed clause therein is not as favorable to the defendants as the condition set out in their letter above referred to and accepted by the plaintiff, namely: "Provided the purchaser will accept transfer from the Corporation as Executors and Trustees, the only expense to be borne by the estate being the proving or re-sealing of the will in Manitoba."

I hold on those grounds that the so-called "formal offer" was not really the offer in the transaction, that it was only required by the defendants as a matter of convenience and uniformity in the keeping of their sale

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PRENDERGAST, J.

records, that the parties intended to be bound in the usual way by their correspondence irrespective of such offer, and that the agreement was completed by Mr. Maulson mailing his letter of July 28th to the defendants.

I hold, however, that specific performance is not in order here, as the defendants in my opinion have no power to convey. I do not think that the will (Ex. 3), under which Thomas Robertson appointed the defendants executors and trustees of his individual property, has the effect of making them executors and trustees with power to convey, as to the property in question which he (the testator) himself held in trust.

Nor do I think that I should entertain the plaintiff's application, made at the close of the argument, to be allowed to amend so as to include in his prayer a claim for damages. The defendants were not prepared to meet that without notice.

I will then dismiss the action. But as the only ground on which I do so is not set out in the statement of defence, and it also appears that the only reason why an honest effort was not made to carry out the agreement was simply that the land is rapidly increasing in value, the plaintiff will have his costs of suit.

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IN THE COURT OF APPEAL.

LOVE v. MACHRAY.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Landlord and tenant—Liability of landlord for dangerous condition of premises causing injury to third party—By-law of municipality requiring wells to be kept properly covered.

1. There is no common law liability on the part of an owner of land in the occupation of a tenant to keep a well on the premises covered for the protection of any person going, or pasturing animals, on the land with the permission of the tenant.

Lane v. *Cox*, [1897] 1 Q. B. 415, and *Cavalier* v. *Pope*, [1905] 2 K. B. 757, [1906] A. C. 428, followed.

2. A by-law of a municipality requiring that every well therein that is not fenced in shall at all times be kept properly covered, except when necessarily opened for the purpose of obtaining water or of cleaning or repairing it, casts no duty upon the owner of the land if it is in the possession of a tenant and the owner has no right to go upon the land for the purpose of attending to the covering of the well, or for any other purpose.

Quære, whether a person who has been injured by reason of a breach of a by-law imposing a duty upon a particular person, and a penalty for such breach, can maintain an action for damages against such person.

DECIDED: 4th March, 1912.

Statement. THIS action was brought to recover damages for the loss of a horse which was killed by falling into a well. The evidence showed that the defendant had entered into an agreement for the purchase of a section of land from the plaintiff and certain members of the plaintiff's family. The land was held by the defendant as a bare trustee for the Oakland Club, and the defendant had no personal interest in the land. The Oakland Club let the land to one Cooper and Cooper entered into an arrangement with the plaintiff to pasture several of the plaintiff's horses upon the land. While the horses were so pasturing upon the land one of them fell into an uncovered well and sustained such injuries that it died.

This action was brought against the defendant as the owner of the land to recover damages for the loss sustained by the plaintiff. The case was tried before Judge

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Ryan who entered a verdict for plaintiff, assessing the damages at $200. 1912

Statement.

Defendant appealed.

C. H. Locke for defendant, appellant, cited *Lane* v. *Cox*, [1897] 1 Q.B. 415; *Robbins* v. *Jones*, 15 C.B. N.S. 220; *Cavalier* v. *Pope*, [1905] 2 K.B. 757; *Tompkins* v. *Brockville*, 31 O.R. 124, and *Addison on Torts*, 8th ed. 104.

W. J. Cooper, K.C., for plaintiff, respondent.

RICHARDS, J.A. The defendant has an equitable title to certain property, under an agreement to purchase. Certain parties, for whom he alleges he holds it in trust, let the property to one Cooper, who entered into possession. Cooper agreed with the plaintiff, for a consideration, that the plaintiff might pasture horses on the land. One of these horses fell into an uncovered well on the land and was injured so that he died. The plaintiff sued the defendant, in the County Court of Portage la Prairie, for damages for the loss of the horse.

As Cooper was in possession of the property, and the defendant is not shown to have had any right to enter on the property to cover the well, and it is not even shown that the defendant knew that there was an uncovered well on the property at any time at which he may have had control, it seems to me that there is no common law liability.

It is claimed, however, that the defendant is liable because of a by-law of the Rural Municipality of Portage la Prairie, within which the land is situate.

Section 635 of the Municipal Act gives the municipality power to pass a by-law, for compelling, or regulating, the enclosing, or covering up, of all wells that are open, or insufficiently guarded, in the municipality, by the owners or occupants of the land whereon such wells are situate.

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Judgment.

RICHARDS, J.A.

The by-law says that every well within the municipality, that is not enclosed within a lawful fence, shall be covered with a sufficient and proper covering, and shall at all times be kept covered, except when necessarily opened for the purpose of obtaining water, or for the purpose of cleaning or repairing said well; and also that any owner or occupant of any land, upon which such well may be situate, shall cover the said well with such good and sufficient covering, within two days after service of written notice on him from the clerk of the municipality or any ratepayer within the municipality, calling upon him to cover such well. It is argued that there is no liability to keep the well covered until after such notice has been given; but that need not now be considered, I think.

The by-law provides for a penalty by fine or imprisonment, in case of default, and also that, if the owner or occupant makes default, the well may be covered by the municipality and the costs assessed and levied against the lands.

Though the word "owner" is used in this by-law, it seems to me that it can only mean an owner who has power to enter and cover the well; otherwise it would impose a penalty upon a party for not doing that which he is unable to do.

In the present case Cooper was in possession as a tenant and, in the absence of evidence to the contrary, the presumption is that the defendant had no power to enter. I cannot think that the intention of the by-law, or of the statute, could be that, in such a case as this, the owner should be subject to punishment, or open to any liability, for not doing that which is to him impossible.

I would reverse the finding of the learned trial Judge in favor of the plaintiff and enter judgment in the County Court for the defendant with costs, including a counsel fee; the defendant to have the costs of this appeal.

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PERDUE, J.A.

PERDUE, J.A. The defendant was not in control of the premises in question and had not undertaken to keep them in repair. The tenant of the premises was the person, if any, on whom the responsibility rested of keeping the well in question fenced or covered. If there was no duty owed by the defendant to the tenant respecting the safe condition of the well, there was none due to a stranger: *Lane v. Cox,* [1897] 1 Q. B. 415, 417; *Cavalier* v. *Pope,* [1905] 2 K.B. 757, confirmed [1906] A.C. 428. This position was indeed conceded by the plaintiff's counsel on the argument and the plaintiff's case was rested upon the by-law of the municipality and upon the legal liability which it was argued followed thereon.

This by-law, being No. 155 of the Rural Municipality of Portage la Prairie, passed under the authority of section 635 of the Municipal Act, provides as follows:

"1. That every well within the Rural Municipality of Portage la Prairie that is not enclosed within a lawful fence shall be covered with a sufficient and proper covering and shall at all times be kept covered except when necessarily opened for the purpose of obtaining water or for the purpose of cleaning or repairing said well.

"2. That any owner or occupant of any land upon which such well may be situated within the municipality shall cover the said well with such good and sufficient covering within two days after service of written notice on him calling upon him to cover such well, which notice may be given by the Clerk of the Municipality or by any rate-payer within the municipality."

Clause 3 provides that any person violating the provisions of the by-law or failing to comply with the same, shall be subject on conviction before a Justice of the Peace to a fine or to imprisonment for twenty-one days.

Clause 4 provides that in the event of any owner or occupant of any land on which there is any such uncovered well making default in covering the well as aforesaid, the well may be covered by the municipality

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PERDUE, J.A.

and the costs charged against the owner and added to his taxes.

Clause 5 provides that nothing in the by-law shall prevent any party aggrieved from recovering compensation for damage sustained by any breach of the by-law from the person or persons whose default caused the damage.

Clause 6 defines the word "well" as including any hole or excavation made or used for the purpose of obtaining water.

Without discussing the broad question whether a person who has been injured by reason of a breach of the by-law can maintain an action against the person on whom the duty is imposed, it is clear that, unless the person sought to be charged has committed a breach of the by-law and become liable to the penalty provided, the action will not lie. Looking at the by-law in question, it is clear that the defendant does not fall within the provisions of clause 1. That clause plainly applies to the person who is in occupation of the premises, whose duty it would be to see that the well was kept covered.

Where the owner of land has leased the land to a tenant who is in use and occupation of the land, it would be unreasonable and absurd that the municipality should, under stress of fine or imprisonment, compel the owner of the land to repeatedly enter upon it to see that the well was kept in proper condition, and, in the case of a well that was in actual use, to compel the landlord to see that the tenant covered the well on each occasion after making use of it for the purpose of drawing water.

It is equally clear that clause 2 of the by-law does not apply to the defendant in this case. There is no pretence that any notice was served upon him, either by the municipality or by any other person calling upon him to cover the well, and without notice there is no liability under the clause. There is nothing else in the by-law which will

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afford any assistance to the plaintiff in establishing his claim.

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PERDUE, J.A.

I think the plaintiff failed to show any liability on the part of the defendant. The appeal should be allowed, the verdict in the County Court set aside and a verdict entered for the defendant. The plaintiff will have to pay the costs of this appeal and also the costs in the County Court, including the usual counsel fee.

CAMERON, J.A. Section 1 of By-law No. 155 of the Rural Municipality of Portage la Prairie contains no direct reference to, and does not name any person, landlord or tenant, mortgagor or mortgagee, owner or occupant or trespasser. In the provision that the well shall at all times be kept covered "except when necessarily opened for the purpose of obtaining water or for the purpose of cleaning or repairing said well" the indirect reference is to the person in occupation of the premises where the well is. It would be the occupant or tenant of the premises who would ordinarily use the well and keep it in order. This indirect reference can hardly be extended to include landlords or mortgagees, or owners not in possession.

Section 2 of the By-law does not apply here at all. There was never any notice served on the defendant in this case.

Section 3 of the By-law, the penalty clause, "that any person violating the provisions of this by-law * * * shall be subject * * to a penalty," &c., applies to the persons designated in section 2. That it has any application at all to section 1, wherein no persons are mentioned, is doubtful. If it does apply, however, to section 1, it can only refer to occupants. The judgment of the Court below must be set aside.

HOWELL, C.J.M., concurred.

Appeal allowed.

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IN THE COURT OF APPEAL.

FRASER v. CANADIAN PACIFIC RAILWAY COMPANY.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Assignment of chose in action—Building contract—Assignment by contractor without consent or knowledge of proprietor—Priority as between successive assignments—Notice to debtor.

One Garson entered into a contract in writing with a railway company for the erection of a number of stations. The contract provided that Garson should not assign it or sublet the work or any part of it without the written consent of the engineer. He, nevertheless, shortly after entering into the contract, made an arrangement with the plaintiff to the effect that the latter should construct the stations in his place and that he would turn over to the plaintiff the payments for the work as and when received from the company. The plaintiff then proceeded to do the work and completed it according to the contract. He did not notify the company of the arrangement between him and Garson.

The company's officers knew that the plaintiff was doing the work, but had no reason to suppose that he was not doing it as Garson's manager or agent and gave no consent to any assignment.

While the work was in progress, Garson gave the Imperial Bank an assignment of all his claims against the company for moneys then due or to accrue due to him from the company and the Bank at once gave notice of this assignment to the company. The company thereafter made payments of progressive estimates on the work to the Bank and paid nothing to the plaintiff.

When the Bank took its assignment from Garson, it had no notice of the plaintiff's position, but, from about the time the first estimate was paid, it knew that the plaintiff was doing the work and that Garson from time to time transferred to him the progressive payments, with the understanding that they were to be handed over to the plaintiff.

Held, 1. The agreement between Garson and the plaintiff at most amounted to an equitable assignment of the money to be earned, and the Bank, having acquired priority for its assignment by first giving notice to the company, was not affected by its subsequent knowledge of the plaintiff's position, and was entitled to retain all money received and to receive the balance still unpaid by the company.

2. The plaintiff could, under the circumstances, have no claim against the railway company in respect of the work.

Burck v. *Taylor*, (1893) 152 U. S. at 649, and *In re Turcan*, (1888) 40 Ch. D. 5, followed.

DECIDED: 5th March, 1912.

Statement. THE plaintiff brought this action to recover certain

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Statement.

moneys he claimed from the Railway Company, and for a declaration that moneys earned under a contract entered into by the late William Garson with the Canadian Pacific Railway Co. for the construction of stations on one of the Company's branch lines, were the moneys of the plaintiff, and were not affected by an assignment made by Garson to the Imperial Bank.

The following judgment at the trial was delivered by

MATHERS, C.J.K.B. On the 11th April, 1910, the late William Garson entered into a contract in writing with the Canadian Pacific Railway Company for the construction of six stations on the Company's Outlook branch. On the 24th day of June, 1910, Garson assigned, by writing under seal, to the Imperial Bank all his claim and demand against the Railway Company for moneys then due or thereafter to accrue due to him from the Railway Company, of which assignment the Railway Company was immediately notified by the Bank. As the work was done progressive estimates were from time to time issued and the proceeds thereof paid to the Bank under its assignment, leaving a balance of $8,433.70, which the Company has paid into Court. The total amount earned in the construction of these stations was $23,283.70, of which the Bank received $14,850. Of this sum the Bank paid to the plaintiff $7,020 under circumstances I shall hereafter relate. The amount retained by the Bank is $7,830. For the recovery of this latter sum together with the $8,433.70 paid into Court this action is brought. At the opening of the trial plaintiff's counsel abandoned the claim against the Railway Company and the trial proceeded against the Bank alone.

By paragraph two of his statement of claim the plaintiff alleges the contract between Garson and the Railway Company for the construction of these six stations.

Paragraphs 3 and 4 are as follows: "3. A short time after entering into the said contract and before any

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MATHERS, C.J.

work was done thereunder, the said Garson assigned and sub-let the same and the work to be done thereunder to the plaintiff and directed the Railway Company to make payment of all moneys to be earned under the said contract to the plaintiff, to which arrangement the Railway Company assented, and the said Garson retained no interest in the said contract or the moneys to be earned thereunder."

"4. The plaintiff thereupon with the full knowledge, consent, and approval of the Railway Company, of the facts alleged in the next preceding paragraph hereof, undertook the said work and completed the same whereby the said defendant became indebted to him in the sum of $23,353.00. The said defendant has paid on account of such indebtedness the sum of $14,820, leaving a balance owing and unpaid by it of $8,403."

Paragraph 5 alleges that Garson, being indebted to the Bank and at that time having a large number of other contracts with the Railway Company, gave the Bank the assignment before referred to under which the Bank claims to be entitled to the moneys in question.

Paragraphs 6, 7 and 8 are as follows: "6. The plaintiff charges as the fact is that the Imperial Bank took the said document in the next preceding paragraph set forth with full notice and knowledge of the assignment and sub-letting of the contract hereinbefore referred to from the said Garson to the plaintiff, and that the plaintiff was then erecting the stations and performing the work for the Railway Company under the said contract and assignment and sub-letting thereof to him, and that all moneys earned and to be earned under the said contract were, and would be, earned by and payable to the plaintiff and not otherwise, and that the said Garson never at any time had any interest, claim or demand upon the Railway Company or the plaintiff in respect of the moneys earned and to be earned under said contract."

"7. The sum of $7,830 of the moneys so paid by the Railway Company, as hereinbefore set forth, was paid to the Imperial Bank under the claim made by it upon said moneys by virtue of the said instrument in the fifth

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paragraph hereof set forth, but the plaintiff charges, as the fact is, that the said Imperial Bank received the said moneys with the full knowledge that the same were the moneys of the plaintiff and under an agreement with the plaintiff, that the said Imperial Bank would place the said moneys to the credit of the plaintiff, and pay over and account to him therefor; but the said Imperial Bank has neglected and refused and still neglects and refuses to pay over to the plaintiff the said sum of $7,830 or to account to him for the same."

"8. In the alternative the plaintiff says that on or about the 11th day of April, 1910, the said William Garson entered into the contract with the Railway Company in the second paragraph hereof alleged. That subsequently, with the full knowledge, acquiescence, consent and concurrence of the Railway Company, the said Garson entered into the contract and agreement with the plaintiff, whereby the plaintiff was to perform all of the works contemplated and provided for in and by the said contract and that all the moneys to be earned under the said contract should be paid by the Railway Company to the plaintiff. The plaintiff thereupon entered upon the said works and completed the same whereby the said Railway Company became indebted to him in the sum of $23,353 as hereinbefore set forth, and said defendant has paid to the plaintiff on account thereof only the sum of $7020.00, leaving a balance now owing and unpaid to him of the sum of $16,338.00."

By his prayer the plaintiff claims:

(1) The whole sum of $16,333.00 from the Railway Company;

(2) A declaration that the moneys earned under said contract are the moneys of the plaintiff and are not affected by the Bank's assignment;

(3) Payment by the Bank to the plaintiff of the $7,830 retained by it.

The Railway Company by its defence admits the contract with Garson and the payment to the Bank of $14,850, and that the Bank claims the balance of the

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moneys earned, and puts in issue the other allegations in the statement of claim.

The Bank by its defence admits that it knew that Garson had contracts with the Railway Company in 1910, but denies that it had notice of the assignment or sub-letting of the contract by Garson to the plaintiff, or of the other facts alleged by plaintiff.

I find that, within a few days after Garson entered into the contract with the Railway Company for the construction of these six stations, he had a conversation with the plaintiff during which he told the plaintiff that he, Garson, did not care to do this work and that he was willing to turn it over to the plaintiff at the same contract price that he was to receive from the Company. I find that the plaintiff agreed to take the work over. I find that the plaintiff thereupon proceeded with and completed the work called for by the contract and that he supplied the materials therefor and paid the wages out of his own moneys.

There is no evidence whatever that the Railway Company knew anything about the plaintiff's arrangement with Garson or assented thereto, or that Garson ever directed the Company to pay the moneys to be earned to the plaintiff or that it agreed to do so as alleged in paragraphs 3, 4 and 8 of the statement of claim, or that the Railway Company ever became indebted to or liable to the plaintiff in any sum whatever.

The contract between Garson and the Railway Company was put in and in paragraph four it expressly provides that the contract shall not be assigned, nor shall the work or any part of it be sub-contracted without the written consent of the engineer to such assignment or sub-contract. It is not pretended that the assent of the engineer or of the Company was obtained to the arrangement between the plaintiff and Garson. What then was the position of the plaintiff with respect to this

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work? He was not an assignee of the contract and he was not a sub-contractor. He could not become so without the consent of the Company. Dealing with a contractor's right to assign, without the consent of the other party, a building contract containing a similar prohibition to that contained in this contract, the Supreme Court of the United States said, in *Burck* v. *Taylor,* 152 U.S.R. at 649: "Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor and equally binding upon all who dealt with him. It is unnecessary to hold that the contractor might not be personally bound upon his promise made before the performance of the contract to transfer a portion of his profits to a third party. Whatever liabilities he might assume by such a promise it would be an independent promise on his part and would not let the promisee into an interest in the contract. It would give him no right to take part in the work, no right to receive anything from the State (the owner), and all that it would give him would be an independent right of action against the contractor for failure to pay that which he had promised to pay, the contract remaining all the time the property of the contractor subject to disposal by and with the assent of the State. To him alone would the State remain under obligations and with him alone would the State be required to deal. In no way, by garnishment, injunction or otherwise could the promisee prevent the State from carrying out the entire contract with the contractor, paying him the full consideration and receiving from him a full release." That seems to be consistent with the views entertained by the Court of Appeal in England in *Re Turcan,* 40 Ch. D. 5.

The resulting conclusion is that, as between the Railway Company and the plaintiff, the latter had no claim upon the Company. Garson could not assign or sub-

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contract without the Company's assent, which was not obtained. No case of acquiescence or implied consent was made out; so far as the facts appear the Company had no reason to suppose that Fraser was not Garson's deputy doing the work as his manager. So far as the Company was concerned the moneys were earned by and were payable to Garson and to no one else.

The allegation in the statement of claim is that the contract was "assigned and sublet" to the plaintiff. There is a great difference between assigning and sub-letting or sub-contracting, which is the better term, and the one that I think the pleader meant. The plaintiff could not be both assignee and sub-contractor. If Garson had assigned with the consent of the Company a privity would have at once arisen between the assignee and the Company. If, on the other hand, he had sub-contracted no such privity would have arisen. Garson was prohibited by the terms of his contract from doing either and could not therefore do either, but it may be material to ascertain which he attempted to do. I think it is fairly clear that he intended to have the plaintiff take his place under this contract in so far as it was possible for that to be done without the knowledge or consent of the Railway Company. I think the real arrangement was that the plaintiff should construct the stations in the place and stead of Garson and that the latter would turn over to him the progressive payments as and when they were received from the Company. The moneys were Garson's as between him and the Railway Company and what took place between Garson and the plaintiff at most amounted to an equitable assignment of these moneys to the plaintiff.

The plaintiff has entirely failed to establish the allegations in paragraphs 3, 4, and 8 of his statement of claim in so far as it is therein alleged that the plaintiff became assignee of the contract and performed the work

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with the knowledge, consent or acquiescence of the Railway Company and that as against the Company he was entitled to these moneys.

The case as stated against the Bank is contained in paragraphs 6 and 7 of the statement of claim. Paragraph six alleges that the Bank took its assignment with notice of the arrangement arrived at between Garson and the plaintiff, and seven alleges that the Bank received the moneys with a knowledge that they were the plaintiff's and under an agreement with him that the Bank would place such moneys to the plaintiff's credit and pay over to and account to him therefor and that it has refused to do so.

I may say at once that the allegations in paragraph six have not been established. I find that, when the Bank took its assignment from Garson, it had no notice of any interest that the plaintiff had acquired in any Garson contract with the Railway Company, or of any arrangement that had been made between Garson and the plaintiff with respect thereto. I do not think the Bank's rights can be affected by any knowledge of that relationship which may have come to it later. As soon as the Bank took its assignment it perfected it by notice to the Railway Company and thus gained priority over the plaintiff's assignment of which no notice was ever given. It is trite law that, as between successive assignees, the one of the later date, if he takes without notice of the earlier one, obtains priority by first giving notice to the holder of the fund. If the plaintiff had succeeded in making the case that he set out to establish and had proved a novation, the moneys would have been his from the beginning and not Garson's, and would not have passed to the Bank under its assignment, and in this case the receipt by the Bank of notice of the plaintiff's claim before receiving the moneys might make the Bank

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liable to the plaintiff for them. But that is not the case here. The Bank had a prior claim to the fund.

It is argued, however, that notice to the Bank of the plaintiff's earlier assignment before the fund came actually into its possession altered the position of the claimants and deprived the Bank of the priority it had gained by first giving notice of its assignment. To my mind that contention is untenable.

But, if notice were material, I could not find that the Bank had notice of what the plaintiff's claim to these moneys actually was until after the commencement of this action. Even then what the pleadings put forward was a fictitious claim of novation that no attempt was made to establish.

From about the time the first estimate was paid the Bank knew that the plaintiff was doing the work and that Garson from time to time transferred to him the progressive payments, and I think it can be fairly inferred that the Bank knew that these payments were to be handed over to the plaintiff, but I do not think its knowledge went any beyond this.

There is no evidence at all to support the allegation that the Bank had agreed with the plaintiff to place these moneys to his credit when received as alleged in the seventh paragraph.

The plaintiff's action will be dismissed as against both defendants with costs. The Bank is entitled to receive the moneys paid into Court.

Plaintiff appealed.

M. G. Macneil and *W. L. McLaws* for plaintiff, appellant, cited *Stephens* v. *Green,* [1895] 2 Ch. 148; *Loveridge* v. *Cooper,* 3 Russ. 58; *Hughes* v. *Chambers,* 14 M.R. 163; *Tailby* v. *Official Receiver,* 13 A.C. 523; *Derle* v. *Hall,* 3 Russ. 1; *Eng. & Scot. Inv. Co.* v. *Brunton,* [1892] 2 Q.B. 700; *Ward* v. *Duncombe,* [1893] A.C. 369; *Scott* v. *Hastings,* 4 K. & J. 633; *In re*

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Miller, 1 Sask. 91; *Heyd* v. *Millar,* 29 O.R. 735, and *Webb* v. *Stenton,* 11 Q.B.D. 518.

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HOWELL, C.J.M.

C. P. Fullerton, K.C., and *J. P. Foley* for defendants, The Imperial Bank.

The judgment of the Court was delivered by

HOWELL, C.J.M. The plaintiff's case is that he obtained an equitable assignment of the chose in action which was created by the agreement made between the C.P.R. and the deceased Garson.

The bargain or arrangement made between the deceased and the plaintiff was verbal and the only witness to the terms of that bargain is the plaintiff. His evidence is conflicting and unsatisfactory. It seems certain, however, that the deceased Garson was to receive the money from the Company and was to pay the plaintiff. Counsel for the plaintiff asserts, and there seems to be evidence to support it, that this agreement was reduced to writing, but it was not produced and we are in the dangerous position of hearing parol evidence to prove the terms of a written contract where the loss is only vaguely accounted for. I think it would be unsafe from the evidence to find as a fact that there was an equitable assignment of this chose in action. For all that appears in the evidence the bargain might have been (and indeed it seems to have been) that the plaintiff was to do the work for the deceased for the same sum which the latter had contracted for and that he would be paid for the same from time to time as the deceased received the money therefor from the Company. This would not be an assignment of the chose in action. The appeal is dismissed with costs.

Appeal dismissed.

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WALLACE v. SMART.

Before MATHERS, C.J.K.B.

Registered judgment, realizing on—Land held by deed from judgment debtor absolute in form but only as security—Rights of purchaser from apparent owner—Power of sale—Notice—Costs.

Action for sale of the interest of the defendant Smart in the lands in question to realize the amount of the plaintiff's registered judgment. Smart had, before the registration of the judgment, conveyed the land, subject to a prior mortgage, by a title absolute in form to the defendant Hinch but only as security for a debt. Two days before the registration of the plaintiff's *lis pendens* in this action, Hinch had assumed to sell the lands to the defendant Bonter, who paid a deposit of $55; but, before anything else was done towards completing his purchase, Bonter had full knowledge of the action.

Held, 1. That the interest of Smart was "land" within the meaning of The Judgments Act, R.S.M., 1902, c. 91, and could be sold to realize the amount of the plaintiff's judgment.

McCabe v. *Thompson*, (1857) 6 Gr. 175, and *Fitzgibbon* v. *Duggan*, (1865) 11 Gr. 188, distinguished.

(2) Hinch was a mortgagee without power of sale unless to a purchaser without notice.

Pearson v. *Benson*, (1860) 28 Beav. 598, followed.

(3) Plaintiff's rights were not affected by the attempted sale to Bonter, except to the extent of the money Bonter paid before the registration of the *lis pendens*.

(4) Plaintiff was entitled to redeem Hinch, or sell subject to his claim at his (plaintiff's) option.

(5) A judgment creditor, like any other subsequent incumbrancer, has the right to bring an action to sell the equity of redemption held by his judgment debtor without making the mortgagee a party; and, when a prior mortgagee holds by a title absolute in form, he may be made a party defendant without an offer to redeem: *Moore* v. *Hobson*, (1868) 14 Gr. 703.

For the directions as to costs, see the judgment.

DECIDED: 8th January, 1912.

Statement. THIS action was commenced by the plaintiff to sell the interest of the defendant Smart in Lot 250 part of 79 St. James, Plan 49, under a registered judgment recovered by the plaintiff against him. The land at the commencement of the action stood in the name of the defendant Hinch, subject to a mortgage, but during its pendency was transferred to and certificate of title issued to the defendant Bonter, subject to the same mortgage

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and also subject to the *lis pendens* which the plaintiff had registered. The plaintiff's certificate of judgment was registered on the 28th February, 1911. On the 13th May, 1911, the defendant Bonter agreed to purchase the lot in question from Hinch for $9800, and on that day paid a deposit of $55. On the 15th May, 1911, two days later, this action was commenced, and a *lis pendens* registered, and before anything else was done by the defendant Bonter towards the completion of the purchase he had full knowledge of the action as it was then constituted.

J. E. O'Connor and *R. W. Jacob* for plaintiff cited *Moore* v. *Shelley,* 8 A.C. 285, 291; *Langton* v. *Waite,* L.R. 6 Eq. 165; *Moore* v. *Hobson,* 14 Gr. 730; *Rogers* v. *Lewis,* 12 Gr. 257; *Barnhart* v. *Greenshields,* 9 Moo. P.C. 18; 14 Eng. Rep. Reprint, 204; *Oland* v. *McNeil,* 32 S.C.R. 23, and *Rose* v. *Peterkin,* 13 S.C.R. 677.

A. H. S. Murray and *B. C. Parker* for defendants cited *Rutherford* v. *Mitchell,* 15 M.R. 390; *Re Chawners,* L.R. 8 Eq. 570; *McCabe* v. *Thompson,* 6 Gr. 175; *Fitzgibbon* v. *Duggan,* 11 Gr. 188; *McDougall* v. *Campbell,* 6 S.C.R. 502; *Middleton* v. *Scott,* 4 O.L.R. 459; *Daigneau* v. *Dagenais,* 5 O.L.R. 205; *Winters* v. *McKinistry,* 14 M.R. 294; *Carroll* v. *Robertson,* 15 Gr. 176; *Bevis* v. *Boulton,* 7 Gr. 39; *Watson* v. *Royal,* 14 Vict. L.R. 283, and *LeNeve* v. *LeNeve,* 2 W. & T. Lead. Cases, 245.

MATHERS, C.J. K.B. The plaintiff alleges that Hinch is a mortgagee without a power of sale, and that Bonter bought with notice of the plaintiff's rights. He asks for a declaration that his judgment forms a lien and charge upon the interest of the defendant Smart in the land, and for a direction that the same be sold to satisfy his claim, or in the alternative, that he may be permitted to redeem the land. The defendant Hinch admits that he was the registered owner at the commencement of the

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action, but denies that the defendant Smart is entitled to any estate or interest therein. The defendant Bonter claims to have been an innocent purchaser for value without notice.

It was not seriously disputed at the trial that, although the defendant Hinch held the land by a title absolute in form, yet he held merely as a security for the price of certain lumber and building materials which he had supplied to Smart, and I find as a fact that Hinch held the land as security only, or, in other words, that he was but a mortgagee.

Neither was it disputed that, before the defendant Bonter had paid anything more than $55 as a deposit on the purchase price, he had full notice of the plaintiff's claim that Smart had an interest in the lands in question, and he completed the purchase reserving $1,000 to cover the plaintiff's claim.

The defendant Smart had entered into a contract with the defendant Hinch and also a contract with one Russell for the erection of a dwelling house for each of them. He was unable to procure the lumber and building materials requisite upon his own credit, and he applied to the defendant Hinch, who, although not a lumber dealer, agreed to sell them to him. Hinch purchased the materials from a regular dealer at wholesale prices and resold to Smart at the regular retail prices, thereby making a considerable profit. It was claimed by the plaintiff at the trial that Smart did not purchase the lumber from Hinch, but that Hinch merely guaranteed Smart's account to the regular dealer, and that, consequently, Hinch must account to Smart for the discount which he obtained. The agreement entered into between Hinch and Smart is in writing and puts it beyond doubt that the arrangement was that Hinch should sell the lumber and building materials to Smart. I find that the transaction took that form, and that Smart is not entitled

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to be credited with the profit which Hinch made on the purchase and resale of the building materials.

In order to secure Hinch, Smart assigned the contract for the construction of the Russell house, and all interest which Smart had in the said lot 250 (to quote from the agreement) "as security for any sums for which the contractor (Smart) may become indebted to" Hinch.

At the trial it was first contended by counsel for the defendant Hinch that, where a party holds as mortgagee by a title absolute in form, the equity of redemption is not saleable under a judgment, and *McCabe* v. *Thompson,* 6 Gr. 175, and *Fitzgibbon* v. *Duggan,* 11 Gr. 188, were cited. These cases, however, turned entirely upon the fact that the Ontario statute then in force for the sale of equities of redemption did not extend to such a case, but only to cases where the equity of redemption appeared on the face of the mortgage.

By The Judgments Act, R.S.M. 1902, c. 91, the expression "land" is interpreted to cover all interests whether legal or equitable and is quite wide enough to include such an interest as the defendant Smart had in this land.

It was also contended that Hinch had the powers of sale conferred by the Short Forms of Indenture Act. It is quite clear that, as the instrument creating the security does not purport to be made pursuant to that Act, Hinch is not entitled to invoke its provisions.

The position of Hinch seems to be that he is a mortgagee without a power of sale. None of the writings gave him a power to sell. An attempt was made to prove an oral power of sale, but even if such a power could be conferred by word of mouth, a point on which I express no opinion, I cannot hold that Smart ever gave Hinch authority to sell without his consent.

It has been held that a power of sale will not be

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implied where a mortgagee holds by a deed absolute in form: *Pearson* v. *Benson,* 28 Beav. 598; *Bell & Dunn on Mortgages,* 169. Even if Hinch had a power of sale he could not exercise it before default by the mortgagor. As no time was fixed for payment of the mortgage moneys Smart would not be in default until he had failed to comply with a demand for payment, and no demand was made.

It follows that Hinch had no power to sell even with notice to Smart and the plaintiff, but it is not contended that notice of the exercise of the pretended power of sale was given. Hinch's right was to foreclose: *Fisher on Mortgages,* par. 1001, 1004; *James* v. *James,* L.R. 16 Eq. 153; *Backhouse* v. *Charlton,* 8 Ch. D. 444.

This is not like the case of *Oland* v. *McNeil,* 32 S.C.R. 23, relied upon by Hinch's counsel. In that case the grant was by deed absolute in form, which contained an express trust for sale and it was held that he had a right to sell without notice. Here there was no trust for sale express or implied.

I hold, therefore, that, as against the defendant Hinch, the interest which the plaintiff acquired by the registration of his certificate of judgment has not been affected by the attempted sale.

At the time the defendant Bonter paid his deposit of $55 he had no notice of the plaintiff's claim, but he acquired notice immediately afterwards. It is said that at that time the statement of claim merely alleged that Hinch held the lands in trust for Smart, and that the claim that he held as a mortgagee was not put forward until after Bonter had completed the sale. I do not think it makes any difference so long as Bonter had notice that the plaintiff claimed Smart had some interest in the land which was saleable under his registered certificate of judgment. For example, notice that a person had a judgment or a warrant of attorney affecting an estate would

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bind a purchaser, though in fact the claimant had a mortgage: *Dart, Vendor & Purchaser,* 876, 889.

The fact that Bonter is a purchaser from a mortgagee who held by deed absolute in form protects him only in the absence of notice: *Ross* v. *Peterkin,* 13 S.C.R. 677; 27 *Cyc.* 1033. If a purchaser receives notice before he has completed his purchase by actual payment, he is affected. Although the conveyance has been made, if payment has not, he must hold his hand; and, if part payment has been made, he is an innocent purchaser only to the extent that payment has been made: 35 *Cyc.* 346, 347; 23 *Am. & Eng. Encyc.,* 520; *Smith's Equity,* 354; *Tourville* v. *Naish,* 3 P. Williams, 307; *Dart on Vendor & Purchaser,* 836. He claims the benefit of section 91 of the Real Property Act; but, as the certificate of title under which he holds is expressly made subject to the plaintiff's *lis pendens,* that section cannot aid him.

In my opinion, the defendant Bonter, except as to the sum of $55, is in no better position than the defendant Hinch.

It is further contended that an incumbrancer cannot force a sale upon a prior mortgagee, and that the only right of the sub-incumbrancer is to redeem. As a general rule, a sub-mortgagee cannot make a prior mortgagee a party without offering to redeem him: *Rogers* v. *Lewis,* 12 Gr. 257; *McDougall* v. *Campbell,* 6 S.C.R. 502. And it may, I think, be taken as settled that a sale of the interest of a prior mortgagee will not be decreed at the instance of a sub-mortgagee without his consent. But that only applies to a case where the plaintiff seeks to sell, not only his debtor's interest, but also the interest of the prior mortgagee and force the prior mortgagee in this way to realize his claim. The rule has no reference to a case where the subsequent incumbrancer only seeks to sell the interest of the mortgagor subject to the rights of the prior mortgagee. That can always be

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done, and a judgment creditor, having a registered judgment, has always had the right to bring an action to sell the equity of redemption held by his judgment debtor without making the mortgagee a party. And, where a prior mortgagee holds by a title absolute in form, he may be made a party defendant without an offer to redeem: *Holmsted & Langton,* 325; *Bell & Dunn on Mortgages,* 225; *Moore* v. *Hobson,* 14 Gr. 703. In such a case the second mortgagee has the option of redeeming or foreclosing or selling subject to the prior mortgage, *Moore* v. *Hobson, supra,* per Spragge, V.C., at 704. In this case the plaintiff elects to sell, and he is entitled to that relief.

There will be a declaration that the plaintiff's judgment forms a charge upon the interest of the defendant Smart in the lands in question and for an order directing the sale of that interest; or the plaintiff may, at his option, redeem. In order to ascertain what that interest is, there will be a reference to the Master to take the accounts as between Smart and Hinch.

The defendant Bonter is entitled to a lien to the extent of the deposit paid at the time of the sale, and interest thereon, to be paid out of the proceeds of the sale in priority to the plaintiff's claim.

The proper disposition of the costs involves some difficulty. Ordinarily a mortgagee is entitled to the costs incurred by him for the protection, realization or redemption of his security. But wrongful resistance of a right to redeem will justify withholding all or a portion of the costs of suit: *Winters* v. *McKinstry,* 14 M.R. at 308, and costs may be given against him to the extent that they have been increased by his improper conduct: *Fisher on Mortgages,* par. 1872. The defendant Hinch denied that Smart had any interest in the land and claimed to be the absolute owner. He had no reasonable ground for raising an issue of this kind, and to the extent that the costs have been increased by

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Hinch's denial of Smart's interest he must be charged. The plaintiff had a right to take action for the sale of Smart's interest and to make Hinch a party as before pointed out, not because he is entitled to any relief against him, but because of the form of Hinch's security.

As the proceedings are entirely for the plaintiff's benefit and can be of no advantage to Hinch, the latter should be recouped any expense he is put to, except that which was incurred by his own misconduct. I therefore make the following directions as to costs.

1. The defendant Hinch is entitled to his general costs of the action, to be taxed and added to his claim, except in so far as such costs are increased by his denial of Smart's interest in the land and by the sale made to Bonter, and the adding of the latter as a party.

2. The costs mentioned in above exception will be taxed and deducted from Hinch's claim.

3. The plaintiff's costs of suit shall be taxed and added to his judgment debt.

4. The defendant Bonter's costs of suit shall be added to the sum of $55, for which he is given a lien, and be paid out of the proceeds of sale in preference to the plaintiff's claim and costs. But Hinch's claim as against Smart shall be reduced a like amount.

5. In the event of the plaintiff electing to sell the equity of redemption and the sale not realizing sufficient to pay the claims of Hinch and Bonter and their taxed costs, they shall be entitled to recover against the plaintiff such costs as remain unpaid.

6. The costs of the reference to the Master and further directions are reserved.

There will be a reference to the Master to take the accounts between Hinch and Smart as in the case of a mortgage action. Mr. Murray draws my attention to the fact that Hinch has paid $1542.70 to discharge a prior mortgage. He may, of course, add any such payments, properly made in relief of the estate, to his claim.

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THOMPSON v. BALDRY.

Before MACDONALD, J.

Injunction—Promissory notes obtained by fraud—Negotiation of—Affidavit evidence on motion to continue injunction until hearing.

A defendant may be restrained by injunction from negotiating promissory notes obtained from the plaintiff by false representations, and the plaintiff will not necessarily be left to his remedy for damages even though he might be compensated thereby.

On a motion to continue an interim injunction until the hearing, an affidavit of the plaintiff that he believes and fears that the defendant will negotiate the notes, unless restrained, etc., is sufficient without stating the grounds of such belief, as the allegation of fear of negotiation remains.

In re Young, [1900] 2 Ch. 753, distinguished.

DECIDED: 8th January, 1912.

Statement. MOTION to continue an injunction. The plaintiff alleged in his statement of claim that the promissory notes, the negotiation of which was sought to be restrained, were made by the plaintiff and received by the defendants under representations made by the defendant George E. Baldry, which were falsely and wilfully made to induce the plaintiff to make said notes.

J. P. Foley for the applicant cited *In re Young*, [1900] 2 Ch. 753, and *Odgers on Evidence*, 697.

H. E. Swift contra, cited Halsbury, vol. 17, p. 266; *Lloyd* v. *Gurdon*, 2 Swans, 180; *Smith* v. *Aykwell*, 3 Atk. 566, and *Kerr on Injunctions*, p. 563.

MACDONALD, J. The statement of claim alleges certain matters which, if true, would entitle the plaintiff to a return and cancellation of said notes.

On the return of the motion it was urged by counsel for the defendants that this is a case in which, if plaintiff is wronged, he can be sufficiently compensated in damages and there is no evidence that the defendant is not a man of substance, that it is not a matter in which irreparable mischief may result if injunction not granted and that the affidavit in support of the motion is founded on belief without stating grounds of belief.

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MACDONALD J.

The plaintiff in his affidavit in support of his motion verifies the allegations contained in his statement of claim and this of itself is sufficient to entitle him to an injunction.

The material in his affidavit to which objection is taken is in paragraph 6, where he says: "I verily believe and fear that, unless an injunction be granted restraining the defendants from dealing with the remaining notes in the defendants' possession, the said defendant will negotiate the said notes," &c. The objection is that the grounds of his belief are not set forth and the case of *In re Young,* [1900] 2 Ch. 753, is cited, but I do not think that this case has any application here. Supposing we leave out his belief and he simply alleges fear of negotiation, it seems to me sufficient in a case of this kind.

There are cases, other than those in which irreparable mischief may result, in which injunctions may be granted, and even where the plaintiff may be compensated in damages, and I am of the opinion that this is one of them. The action, in part, is that the notes may be delivered up to the plaintiff and the injunction is ancillary to the action.

The defendant files an affidavit in opposing the motion denying the truth of the allegations contained in the plaintiff's statement of claim, but to give effect to this would be trying the case. I cannot see that any harm can come to the defendant by continuing the injunction until the trial, which trial, however, should be expedited.

Costs in the cause.

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McGREEVY v. MURRAY.

Before PRENDERGAST, J.

Real Property Act, R.S.M., 1902, c. 148, s. 138—*Caveat—Application in chambers to discharge.*

An application to a Judge in chambers, under section 138 of The Real Property Act, R.S.M., 1902, c. 148, to discharge a caveat based on a *prima facie* valid document should not be entertained when the affidavits on both sides raise important issues as to disputed facts upon which the right to maintain the caveat depends.

Such issues cannot be properly determined upon the reading of conflicting affidavits.

The matter may be disposed of in chambers if the facts are practically undisputed, or otherwise clearly established, and the issue rests mainly on the interpretation, or validity, of the written document on which the caveat is grounded.

DECIDED: 2nd February, 1912.

Statement. APPLICATION on behalf of caveatee for an order discharging a caveat.

A. E. Dilts, for caveatee.

J. F. Davidson for caveator.

PRENDERGAST, J. The disputed facts are quite involved. There is the matter of an extension of time, of the circumstances of the procuring or attempting to procure a tax certificate, of tender, of an alleged declaration by the caveatee that he would not go on with the deal, and of diverse attendances or conversations of material importance, the averments concerning which on the one part are met by counter-assertions and denials on the other, and *vice versa*.

If the facts were practically undisputed, or otherwise well established, and the issue rested mainly on the interpretation or validity of the written documents on which the caveat is grounded, the application might be entertained.

But it is not the policy of the Court to vacate on a chamber application a caveat based on a *prima facie* valid document, when such intricate questions of fact are raised as in this case. Such an involved issue cannot be

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satisfactorily inquired into and determined on affidavit evidence.

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I must refuse the application, with costs to the caveator.

PRENDERGAST, J.

DONOGH V. MOORE.

Before ROBSON, J.

Contract—Agreement to share profits—Breach of contract—Election to treat contract as broken and sue for damages, or to hold to the contract and wait till the time for performance has arrived—Interest in land—Caveat.

The plaintiff purchased the land in question in his own name in 1901 and, for valuable consideration, agreed with the defendant, who had brought the land to his attention, that the defendant should have one-half of any profit that might be made on a re-sale of the land. Defendant afterwards produced an intending purchaser at an advanced price, but plaintiff then declined to sell, although he did not repudiate or deny the agreement relied on by defendant. Defendant alleged that he had procured and informed the plaintiff of subsequent offers to purchase the land, each one being an advance over the previous one. This was denied by the plaintiff, but there was no proof that the defendant had at any time abandoned his bargain with the plaintiff.

Held, that the defendant was at liberty to treat the plaintiff's refusal to accept any such offer as a breach of the contract entitling him to damages, or to hold to the bargain and wait till the time for its performance had arrived, and was entitled, under his counterclaim in this action, to a declaration that he had a right to receive one-half of any profits which may be derived from any sale of the land that may be effected either by the plaintiff himself or by the aid of the defendant.

Johnstone v. *Milling*, (1886) 16 Q.B.D. per Bowen, L.J. at p. 473, and *McCowan* v. *McKay*, (1901) 13 M.R. 590, followed.

Held, further, that it could not be said that the defendant had any interest or estate in the land itself in respect of which he might register a caveat under the Real Property Act, and that the plaintiff was entitled to judgment setting aside the caveat so registered by the defendant.

Smith v. *Watson*, (1824) 2 B. & C., per Bayley, J. at p. 407; *Meyer* v. *Sharp*, (1813) 5 Taunt. 74, and *Stuart* v. *Mott*, (1894) 23 S.C.R. 387, followed.

DECIDED: 20th February, 1912.

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Statement.

THE plaintiff brought this action to compel the removal of a caveat filed at the instance of the defendant.

Defendant claimed the lands in question had been taken in the name of the plaintiff as a trustee for himself and the defendant, each being entitled to a half-interest, and he contended that, since the purchase had been made of the property, both he and the plaintiff had been in possession of the lands in question and he asked that the plaintiff be declared a trustee in accordance with the terms of the agreement which he set up, and that the lands be directed by the Court to be sold, each of them to have one-half of the proceeds thereof.

W. H. Trueman and *W. Hollands* for plaintiff cited *Hornby* v. *Eberle,* 1 Times L. R. 104.

A. E. Hoskin, K.C., for defendant cited *McNeill* v. *Corbett,* 39 S.C.R. 668; *Caddock v. Skidmore,* 2 De G. & J. 51, and *Dale* v. *Hamilton,* 5 Ha. 369.

ROBSON, J. The parties reside in Winnipeg. Plaintiff has carried on business as a merchant tailor, and defendant as a real estate broker.

About November, 1901, it was verbally agreed between plaintiff and defendant that defendant should select a parcel of land which might be bought reasonably and in such a way that there would be allowed off the purchase price by the vendor a sum for commission to defendant for effecting the sale; that plaintiff should furnish the purchase money less the sum so to be allowed and that the land should be sold when a profit could be realized and the profit divided equally between the parties. Pursuant to this arrangement the defendant brought to the attention of the plaintiff the land now in question, and in the result a formal agreement was entered between the owner and the plaintiff whereby the former agreed to sell to the latter for $1,440. The down payment was $360, which was satisfied by payment of $288 by plain-

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tiff to the owner and the set-off of $72 which may be called defendant's commission.

Plaintiff contends that defendant was to procure a purchaser at a profit within a year, that his so doing was essential to his sharing in the profit, that such was not done and that, consequently, the plaintiff had to make the future payments, as he in fact did. Plaintiff contended that defendant thus lost any rights he may have had. Defendant denies this alleged stipulation. This question became unimportant as it was made clear by the evidence of the witness Lundy that defendant had within the year produced an intending purchaser at an advanced price, and that plaintiff declined to deal with him. Plaintiff did not repudiate or deny the arrangement with defendant. He merely thought it unwise to sell at the price offered. According to defendant there were further offers procured by him, each one being an advance over the previous one. This is denied by plaintiff. Whether there was or was not any subsequent effort by defendant to find a purchaser is material only on the question whether he abandoned his bargain with plaintiff. I cannot find any such abandonment. Defendant did not treat the plaintiff's refusal to accept Lundy's offer or the refusal to accept any alleged subsequent offer as a breach of contract entitling him to damages, but permitted matters between him and plaintiff to stand regardless of any refusal. That defendant was not bound to treat plaintiff's conduct in any such instance as a breach is quite clear. He was at liberty to elect "either to treat the declaration as *brutum fulmen* and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such a declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does

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so elect, it becomes a breach of contract, and he can recover upon it as such." See per Bowen, L. J., in *Johnstone* v. *Milling,* 16 Q.B.D. 460, at 473, cited with other authorities to the like effect by Killam, C. J., in *McCowan* v. *McKay,* 13 M.R. 590. Had the defendant made an election in a binding manner (13 M.R. 596) to treat plaintiff's refusal as a breach, his cause of action might date from the breach and the period of limitation of an action for damages would become important, but there was no such election. In my view, therefore, the contract still stands and the only question is what is the position of the parties thereunder.

The defendant asserts that he has an estate or interest in the land in question and, the title being in the name of the plaintiff, he, defendant, filed a caveat. The plaintiff seeks the removal of that caveat. This would involve an adjudication that defendant has no such estate or interest. In my view the defendant has no estate or interest in the land, but has simply a right, when it is sold, to receive one-half of the profits realized.

That the purchase price to the plaintiff was reduced by $72 was, together with the defendant's finding a suitable parcel of land, the consideration for the plaintiff's agreement to give the defendant one half of the profits on a sale. There was clearly no partnership. Had there been a loss, defendant would not have been liable to share it. Defendant had merely an unconditional right to share in the profit realized on a sale. This right would, if defendant should so elect on plaintiff's refusal to sell on reasonable request, give defendant an action of damages. That this is the present position of the parties, notwithstanding anything that has elapsed, seems unquestionable. In *Smith* v. *Watson,* 2 B. & C. 401, Bayley, J., said, at p. 407: "Now a right to share in the profits of a particular adventure may have the effect of rendering a person liable to third persons as a partner, in

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respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject matter of the adventure." See also *Meyer* v. *Sharp,* 5 Taunt. 74. *Stuart* v. *Mott,* 23 S.C.R. 387, also shows the distinction between a right of sharing in proceeds and property in the subject matter.

There will be judgment setting aside the caveat and declaring:

1. That the defendant has no estate or interest in the lands in question, and

2. That the defendant, under the contract so found, has a right to receive one half of any profits which may be derived from any sale of the lands that may be effected either by the plaintiff himself or by the aid of the defendant. Otherwise the claim and counterclaim are dismissed.

I will hear counsel on the question of costs.

RE WINNIPEG HEDGE & WIRE FENCE CO.

Before ROBSON, J.

Winding up of company—Contributories—Payment for shares otherwise than in cash—Attempted cancellation of shares by company—Consideration for allotment of shares as fully paid—Manitoba Joint Stock Companies Act, R.S.M., 1902, s. 48.

Application of the liquidator in the winding up of the company, which had been incorporated under the Manitoba Joint Stock Companies Act, R.S.M., 1902, c. 30, to settle one Wallace on the list of contributories in respect of two allotments of 10 and 200 shares respectively of the nominal value of $100 each.

The alleged consideration given by Wallace for the 10 shares was his interest as one of a syndicate of ten persons in a patent for improvements in hedge fences; but, before there was any resolution of the company to purchase the patent rights, it was known that the invention was not likely to prove successful and there was no satisfactory evidence that there had been such an assumption or user of the patent rights by the company that any obligation to pay for same could be implied against the company, or that a formal assignment of the patent rights had ever been given to the company.

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Held, that Wallace should be settled on the list in respect of these 10 shares.

In re Jones & Moore Electric Co., (1909) 18 M.R. 549, followed.

The syndicate of which Wallace was a member had, for two years after the incorporation of the company, carried on the business independently of the company, until, in 1904, a certificate was issued to Wallace for the syndicate for 200 paid up shares in consideration of certain alleged outlays by the syndicate while they had been carrying on the business, and of the transfer to the company of some assets of trifling value.

Held, that no reason had been shown why the company should recoup the syndicate for the alleged outlay, and that the other considerations for the shares were so grossly inadequate that the procuring of their issue was a fraud on the company, and that Wallace should also be settled on the list for the 200 shares less 10 transferred by him previously.

A transfer of shares to the company for cancellation is entirely ineffectual to do away with the liability of the shareholder in respect of such shares.

Smith v. *Gowganda Mines Ltd.*, (1911) 44 S.C.R. 621, followed.

The fact that the certificate for the 190 shares was issued to Wallace as "Trustee for Syndicate" was held not to affect his personal liability as a shareholder under section 48 of the Act, which only applies to a trustee who represents an estate: *Masten's Company Law*, p. 136.

DECIDED: 21st February, 1912.

Statement. THIS Company was in course of winding up under the Winding Up Act, Dominion.

B. D. Wallace was, on the application of the liquidator, called upon to show cause why his name should not be settled on the list of contributories in respect of two allotments of 10 shares and 200 shares respectively, the nominal value of each share being $100.

W. J. Cooper, K.C., and *J. W. E. Armstrong* for liquidator.

A. Haggart, K.C., for Wallace.

ROBSON, J. The above Company was incorporated by letters patent granted by the Lieutenant Governor of this Province on the 24th day of March, 1902.

In or prior to January, 1902, being before the incorporation of the Company, Wallace and certain other gentlemen, who are referred to as the syndicate, agreed

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to purchase from The Stratford Hedge Fence Company, Limited, the right, in respect of a certain portion of Manitoba, to the benefit of a patent issued by the Government of Canada for improvements in hedge fences. The price was to be $10,000. A formal agreement expressing this transaction was filed. It is said that this sum was subsequently paid and apparently that fact cannot be questioned. It was contemplated that a company should be formed and that the rights so acquired should be assigned by Wallace *et al* to that company at a price to be agreed on. The present Company was subsequently formed. The members of the syndicate were the sole incorporators and became the first directors of the Company.

The petition for incorporation sets forth that the applicants, of whom Wallace was one, had each subscribed for one thousand dollars of the capital stock (being 10 shares of one hundred dollars) and had paid the amount in cash. With the petition was filed a declaration by Wallace that the facts alleged in it were to the best of his knowledge and belief true and correct. In fact the sums subscribed were not so paid. The explanation is that the amount paid for the patent right, amounting to $10,000, constitutes the $10,000 in the petition stated to have been paid.

There is no indication of the Company's acceptance of the patent right in satisfaction of the $10,000 subscribed by the original applicants, supposing that to have been within its powers.

In the minute book of the Company is inserted a memo. purporting to be a record of a resolution of the shareholders of the Company of 14th December, 1903, authorizing the preparation of an agreement whereby the members of the syndicate should assign the patent right to the Company for $20,000 of the capital stock of the Company.

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There is no other written indication of there having been a meeting of the Company on 14th December, 1903, than the memorandum above mentioned. It is very doubtful whether there was such a meeting. The resolution also provided that the syndicate were to be allowed shares to the amount of $10,000 as remuneration for their expenses and outlay in connection with the promotion of the Company, together with the costs of selling capital stock and nursery stock and other expenses up to that date. The agreement was to be prepared before the date of the annual meeting on 30th December, 1903, and it was to date back to 7th January, 1902.

A formal document apparently in execution of this intention was signed by nine of the ten members of the syndicate. The resolution and the document merely show what the syndicate desired. As it was to be read as of a date before incorporation, it had no effect on the Company.

In a treasurer's statement dated 30th December, 1903, the assets contain an item "Patent, $20,000." That statement was adopted, but that is not, to my mind, to be taken as sufficient evidence of a contract by the Company to take over the patent right at $20,000, if it is any evidence at all of any such undertaking.

It does not appear that there was at the meeting of 30th December, 1903, any attempt to procure the Company to enter into any arrangement such as was in that resolution foreshadowed.

The syndicate themselves carried on the enterprise till August, 1904, and perhaps later. Before that month it had been the experience of those here concerned that the invention was not likely to prove successful in this country.

On 3rd August, 1904, by-law No. 8 of the Company was passed whereby it was enacted that the Company enter into an agreement with Wallace and associates for

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the purchase of the patent right and for the repayment to them of all expenses of every kind incurred by them in the interest of the Company and for the purchase of all assets belonging to them, the purchase to be made by the transfer to Wallace of 300 shares of paid-up stock.

There was produced a document purporting to be articles of agreement, dated October, 1904, between the Company and the syndicate, drawn apparently in pursuance of by-law No. 8. By this it was provided that the patent rights be assigned to the Company in consideration of 300 paid up shares, *i.e.*, $30,000. This document was signed by seven members of the syndicate and by a person who had succeeded one of them. Thus the signatures of two members were lacking. The document is sealed with the Company's seal and signed by its secretary as such, but not by the president or other officer.

There is no satisfactory evidence that there was at any time a formal assignment of the patent rights to the Company.

While the supposed resolution of 14th December, 1903, would lead one to think that it was then in the minds of the parties that $20,000 stock was to be issued for the patent rights and $10,000 for the outlays, the *viva voce* evidence would indicate that the patent was to be paid for by the $10,000 originally subscribed on the application for charter and that the $20,000 was for outlays, etc.

On 23rd November, 1904, there was issued to Wallace a certificate for ten shares, *i.e.*, $1,000 and a certificate to him for the syndicate for 200 shares, *i.e.*, $20,000. I take it that this $1,000 was his one-tenth of the original $10,000, that a similar issue was made to each of his associates, and that he received the $20,000 certificate for the syndicate's alleged outlays, thus making the $30,000 mentioned in by-law No. 8. Ten shares of the 200 were transferred by Wallace to W. P. Rundle on the

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date of the certificate and on 26th November, 1904, a new certificate was issued to Wallace for 190 shares.

Matters came to such a pass that at a meeting on February 16, 1907, the Company's officers were instructed to request the return for cancellation of such of the 200 shares as had not been sold or transferred, with such notes as had been taken for shares sold.

Nothing seems to have been done, however, till September 2, 1908, when at a meeting the opinion was again expressed that the unsold balance of the $20,000 stock which was supposed to be $12,600 should be re-assigned to the Company and the officers were authorized to request the return from members of the syndicate of shares in all $19,600, though a total of $20,000 was expressed.

On November 2nd, 1908, a transfer of 117 of the shares to the Company was signed by Wallace. That this was entirely ineffectual, see *Smith* v. *Gowganda Mines, Limited,* 44 S.C.R. 621.

The inference is that the issue to Wallace of the certificates of 10 and 200 shares respectively, with the nine like issues of 10 shares to the others, made up the 300 shares mentioned in by-law No. 8. This being so, strictly speaking, it leaves the original subscription without any pretence of payment. But I am, in his favor, imputing the certificate of 10 shares to the original subscription.

On these recited facts, can it be said that the shareholder's liability upon these shares has been satisfied?

As has been stated, I cannot find that there has been an assignment of the patent. From the evidence before me it did not appear that there had been such an assumption or user of these patent rights by the Company that an obligation to pay for it in any manner could be implied against the Company. If the Company got anything at all for the original subscription, it was merely a verbal undertaking to assign the patent, though there is no record of the Company having received even that.

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A plea of set-off of the $10,000, supposing that to be the price of the patent, obviously could not be maintained. The language of Howell, C.J.A., in *Re Jones and Moore Electric Co.*, 18 M.R. 549, at the top of page 571, fits the case exactly.

But, treating the transaction as if the whole 300 shares of the Company were being dealt with by by-law No. 8, which was the first corporate action regarding the patent, and the supposed outlays, the agreement prepared to carry that out was not executed. Under the circumstances of this Company, with the syndicate managing it, I am not disposed to infer from the mere issue of the certificate that the execution of the agreement had been dispensed with and that the transfer of the patent had been made. Suggestions of the loss of papers do not help the matter.

As to the considerations, apart from the patent, for the issue of 300 shares, no very definite statement was forthcoming at the hearing. It was expected that a good deal should be taken for granted. A shareholder who has got his shares in some method other than by the payment of cash ought to be ready when called on to show that consideration passed to the Company.

The statement given by Wallace himself as to this consideration must be examined. It was put under four heads:

First—It appears, as above remarked, that until the stock issued in 1904 the syndicate carried on the venture themselves. The amount spent by the syndicate in that connection in the years 1902, 1903 and 1904 is part of the consideration for the 200 shares. But that there ever was a liability on the Company to assume that amount has not been disclosed to me.

Second—The consideration included the nursery stock the syndicate had on hand.

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Third—Certain orders for work or materials, which orders the syndicate had on hand.

Fourth—A lease of a piece of land which had been planted out, and on which some small buildings had been erected.

No details of any of these items are given, but it was said that with interest they represented about $20,000, which statements I cannot credit. I am given no idea of what the nursery stock was worth or what it cost to get the orders mentioned, nor is there the slightest hint as to the value of the lease. Some figures were given and the best I can make of them is that the syndicate (apart from the cost of the patent) spent about $3,750, but how much of that the Company either expressly or impliedly assumed I know not. Then, as already said, before by-law No. 8 was passed, the patent had been demonstrated to be of no value to the Company. The transaction as to that feature can only be dealt with as of that date, and it seems that the $10,000 stock issued for the patent was, as I must also hold the rest of the consideration for the 300 shares, illusory, and I add that the procuring of such an issue for considerations grossly inadequate was a fraud on the Company.

There can be no doubt as to the liquidator's right to question the transaction. The position of the liquidator here is, as to the 10 shares, stronger than that of the liquidator in *Re Jones & Moore Electric Co.* Here there was no completed transaction as to the patent. The contributory simply fails in proving consideration for the 10 shares. As to the other alleged considerations, the case is in line with *Re Jones & Moore Electric Company,* and the liquidator's position is the same.

The certificate for the 200 shares is to "B. D. Wallace, Trustee for Syndicate."

The personal liability of a certain class of trustees is excluded by section 48 of the Manitoba Act, but a per-

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usal of that section shows that the trustee protected is one who represents an estate. I do not think Wallace is protected by that section. The words "Trustee for Syndicate" merely earmark the shares. As regards the Company, Wallace is for all purposes the shareholder. The persons to whom he may be accountable would have no status in the Company. The subject is dealt with in *Masten's Company Law* at p. 136. Moreover, Wallace was a member of the syndicate and so beneficially interested. His name could not be struck off on this ground. Possibly he would have the right to have the others added jointly with him, but that is another matter.

No stock book or register of shares was produced. While it was said that there have been dealings with the 200 shares beyond the transfer of 10 to Rundle, there does not appear to have been any formal transfer and, from the evidence adduced, Wallace must be considered shareholder for 190 of the 200 shares. Having made the transfer of the 10, he cannot be held liable as a shareholder in respect of them: see *In re Wiarton Beet Sugar Co., Freeman's Case,* 12 O.L.R. 149. Liability in this proceeding under section 123 of the Winding Up Act has not been suggested. It does not seem to me that that section can be invoked on an application to settle a list of contributories.

In the result, the name of the contributory, B. D. Wallace, must remain on the list in respect of the 10 shares and in respect of 190 of the 200 shares, and the list will be varied accordingly. He must pay the liquidator's costs of this proceeding.

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IN THE COURT OF APPEAL.

COMPTON v. ALLWARD.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Bailment—Possession as evidence of title as against a wrong-doer—Chose in action—Assignability of cause of action for a personal injury—Negligence.

1. One, who on a dark night, is driving on the wrong side of a road 24 feet wide and collides with a vehicle going in the opposite direction on the right side of the road, though not proved to have been driving recklessly or furiously, is *prima facie* guilty of negligence, and liable to the person having charge at the time of the other vehicle for any injuries to him or the horse he was driving or to the vehicle and harness.
2. The plaintiff may recover the full amount of the damages caused by the collision, although he is not the owner, but only the bailee on hiring from a livery stable, as possession of the property is sufficient evidence of title as against a wrong-doer. The bailee in such a case must account to the bailor for what he collects above his own interest as money received to the use of the bailor, and the wrong-doer having once paid full damages to the bailee, has a good answer to any action by the bailor.

The Winkfield, [1902] P. at p. 60; *Glenwood* v. *Phillips*, [1904] A.C. 405, and *Turner* v. *Snider*, (1906) 16 M.R. 79, followed.

3. A cause of action for a personal injury occasioned by negligence is not assignable and an assignee cannot recover upon it.

McGregor v. *Campbell*, (1909) 19 M.R. 38, and *McCormack* v. *Toronto Ry.*, (1907) 13 O.L.R. 656, followed.

DECIDED: 20th March, 1912.

Statement. ACTION brought by the plaintiff to recover damages for a horse killed and for personal injuries sustained.

The following judgment was delivered by

MATHERS, C. J. K. B. On a dark night in October, 1911, the plaintiff was driving a horse and buggy, which he had hired from a livery stable keeper, westward on Portage Avenue in this City between the St. James bridge and the City limits. He was on the north side of the travelled portion of the road which, at the point in question, is about twenty-four feet wide. The horse was trotting at from six to seven miles per hour. He heard no noise of anything approaching, but suddenly observed a horse he believed to be about twenty-five feet

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away coming towards him on the same side of the road. The plaintiff turned to the right to avoid a collision, but in an instant the buggy driven by the defendant crashed into the buggy he was driving. Both horses broke loose and ran away. The plaintiff was pulled over the dashboard by the reins, as also was the defendant. The plaintiff's buggy was damaged to the extent of $5. The horse ran away westward, and when a short distance beyond the City limits collided with a baker's delivery wagon and sustained injuries from which he afterwards died.

With the plaintiff in the buggy was a young lady, Louisa Wilson, who was thrown out by the collision and found in the north ditch close to the buggy in an unconscious condition. She was not seriously injured but was unable to resume her ordinary occupation for about a week.

This action is brought by the plaintiff to recover damages for the value of the horse and the damages to the buggy and for personal injuries. He also sues upon an assignment from Miss Wilson for the damages sustained by her.

The negligence alleged against the defendant is that he was driving recklessly and rapidly on the wrong side of the road.

I find, as a fact, that the defendant was driving on the wrong side of the road, that is, on the north side—City Charter, section 737; but I cannot find that he was driving recklessly or negligently, except in so far as driving on the wrong side of the road in a dark night constitutes negligence.

It is objected first, as to the part of the claim held under an assignment from Miss Wilson, that such a claim is not assignable and therefore that the plaintiff cannot recover upon it. With this contention I agree. The law is so settled by *McGregor* v. *Campbell,* 19 M.R. 38, and *McCormack* v. *Toronto R. W. Co.,* 13 O.L.R. 656.

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It is further objected that the plaintiff, being merely a bailee and not the owner of either the horse or the buggy, and not being liable over to the owner for the damage, cannot recover.

The right of the bailee to recover under the circumstances of this case is stated by Collins, M. R., delivering the judgment of the Court of Appeal in *The Winkfield,* [1902] P. at p. 60: "The root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not *ad rem* in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor."

This judgment was approved by the Privy Council in *Glenwood Lumber Co.* v. *Phillips,* [1904] A.C. 405. Lord Davey, who delivered the judgment of the Privy Council, after quoting from the judgment of the Master of the Rolls in *The Winkfield case,* concludes the paragraph: "Their Lordships do not consider it necessary to refer at any greater length to the reasoning and author-

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ities by which the Master of the Rolls supports this conclusion, and are content to express their entire concurrence in it."

These cases were followed by Mr. Justice Richards in *Turner* v. *Snider,* 16 M.R. 81.

As the law stands, I think that the plaintiff is entitled to recover from the defendant the full value of the horse and of the damages to the buggy, provided the damage was caused by the negligence of the defendant.

The defendant was driving at about six or seven miles an hour, and on the north side of the road coming towards the City. The travelled portion of the road is there about twenty-four feet wide, so that there was ample room for him to have driven on the proper side. The plaintiff, coming towards the defendant, saw his horse when about twenty-five feet away, and no doubt the defendant could have seen the plaintiff's horse had he been keeping a look-out. He says, however, he saw nothing and heard nothing until the crash took place. From this I infer that he was not exercising the care that a man driving in the dark on the wrong side of the road should have taken.

That driving as the defendant did under the circumstances constitutes negligence is, I think, established by such authorities as *Oliphant on Horses,* 6th Can. Ed. 342; *Angell on Highways,* par. 337 and *Leame* v. *Bray,* 3 East, 593.

I find, therefore, that the defendant was guilty of the negligence charged and is liable to the plaintiff for the value of the horse and the damage to the buggy.

I find the value of the horse to be $500 and the damage to the buggy was $5.

The plaintiff's claim for loss of earnings was not sustained by the evidence.

As before pointed out, the claim of Miss Wilson was

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not assignable and therefore the plaintiff cannot recover upon it.

There will be judgment for the plaintiff for $505 and costs of suit.

Defendant appealed.

W. Thornburn for defendant.

M. G. Macneil and *B. L. Deacon* for plaintiff.

THE COURT dismissed the appeal without calling upon respondent's counsel.

IN THE COURT OF APPEAL.

HICKS v. LAIDLAW.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Vendor and purchaser—Cancellation of agreement of sale for default by purchaser—Abandonment of purchase—Specific performance—Removal of caveat registered by purchaser—Laches—Declaration of forfeiture—Costs—Purchaser's right to return of money paid—Time as the essence of a contract.

Action by vendor of land under an agreement of sale for a declaration that the purchaser was in default and had abandoned his purchase and for the removal of a caveat registered by the purchaser.

The defendant denied abandonment and asked for specific performance of the agreement. He had made the initial payment on the land, but failed to pay the next instalment when due, whereupon the plaintiff purported to cancel the sale although there was no valid power to do so in the agreement. Defendant afterwards sent plaintiff the money for the overdue instalment and interest, but the plaintiff returned it to the defendant, saying that his claim on the lot "became void some months ago." Defendant then registered his caveat.

Nothing further was done in the matter until the commencement of this action over four years later.

Held, that the plaintiff was entitled to a declaration that the defendant's rights under the contract had been forfeited so far as the land was concerned and that he had, by his delay and laches, lost the

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right to specific performance or to claim damages for non-performance. 1912

Mills v. *Haywood*, (1877) 6 Ch. D. 202, followed.

Whilla v. *Riverview Realty Co.*, (1910) 19 M. R. 746, referred to.

As far as appeared from anything brought forward at the trial, the plaintiff was not the registered owner of the land.

Held, that for this reason she was not entitled to an order for the removal of the defendant's caveat from the register in the Land Titles Office.

Held, also, that, when an agreement contains a clause that time is to be of the essence of the contract, a Court of Equity will give effect to that stipulation unless the party in default can show a sufficient excuse for non-compliance with it and that there was no unreasonable delay on his part, but will relieve against it if it can do justice between the parties and if there is nothing in their express stipulations, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right.

Tilley v. *Thomas*, (1867) L. R. 3. Ch. 67, followed.

Held, also, that, under such an agreement, a mere extension of the time given by the party entitled to performance is only a waiver to the extent of substituting the extended time for the original time and not a total destruction of the essential character of time.

Barclay v. *Messenger*, (1874) 43 L. J. Ch., per Jessel, M. R., at p. 456, followed.

It was not expressly decided whether the defendant was entitled to a return of the money he had paid on this purchase, but the order made by the trial Judge, following the view of Anglin, J., in *Labelle* v. *O'Connor* (1908) 15 O. L.R. 519, that the plaintiff have costs on condition of crediting thereon the cash paid by defendant on the contract, less any money paid for commission on the sale and expenses incident to the agreement, was affirmed.

DECIDED: 4th March, 1912.

Statemen

PLAINTIFF brought this suit for a declaration that defendant had abandoned a contract he had entered into and for the removal of a caveat registered by defendant. The following judgment at the trial was delivered by ROBSON, J. By agreement, dated 24th October, 1904, plaintiff agreed to sell and defendant agreed to buy certain land at the price of $362.00, payable $100 down and the balance of $262 in three equal annual instalments, the first to become payable on 1st December, 1905, all with interest at 6 per cent. per annum. The $100.00

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was paid, but nothing further was accepted by plaintiff though there was a remittance by defendant to plaintiff which is to be mentioned. The plaintiff now alleges default and abandonment by defendant and seeks a declaration to that effect and the removal of a caveat registered by defendant. The defendant denies abandonment and seeks to pay the balance now and take title to the land.

The payment due on 1st December, 1905, was not then paid. The agreement contains a clause reading "Provided also that, on any default in the payment of any instalment of either purchase money or interest, the whole of the purchase money and interest hereby secured shall at once become due and payable."

The document states "that time is to be considered the essence of this agreement."

There are also in the printed portion of the agreement words intended for use as a provision for cancellation in case of default, but certain blank spaces to be filled up to suit each case remain blank. I cannot add anything to the document—I must take it as the parties left it, and assume that this printed clause was not intended to be part of the contract.

On January 9th, 1906, plaintiff wrote to defendant giving him 30 days to pay, and stating that if payment should not be forthcoming the agreement would be cancelled. This was apparently in supposed pursuance of the cancellation clause, but even if that clause were to be read into the contract, the period mentioned in it is one month and not 30 days. The letter referred to, however, made it clear to defendant that plaintiff was not acquiescing in his delay, but was insisting on strict performance.

On June 26th, 1906, defendant wrote plaintiff enclosing money order for $114.96, made up, as he said, as follows:

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Payment due 1st Dec., 1905	$ 87.33⅓
Taxes for 1905, estimated at	9.00
Interest on principal for year	15.72
Interest on money borrowed by plaintiff for 6 months re payment on lot ...	2.90
	$114.96

On July 17, 1906, plaintiff returned this money order to defendant saying that his claim on the lot "became void some months ago."

On 8th December, 1906, defendant registered a caveat under the agreement in question.

The next step at all in the matter seems to have been the commencement of this action on 27th April, 1911.

It appears by the caveat that when it was filed the title to the lot stood not in the name of the plaintiff, but in that of the Riverview Realty Company. It does not appear to me that the defendant's rights as against the plaintiff under the agreement were at all improved by the registration of the caveat. Such rights as he had may thereby have been in a measure protected, but he was not thereby relieved from diligence in the performance of his contract. I think I am bound to treat the matter as if defendant had, at the time of his defence, sought specific performance by the plaintiff. I think he is chargeable with the delay of over four years that took place, whatever the effect of that delay may be.

Cornwall v. *Henson,* 69 L.J. Ch. 583, was a purchaser's action for specific performance or alternatively damages. There had been a delay by the plaintiff of about three years in payment of the final instalment. Regarding a defence of abandonment, Rigby, L.J., said: "It is true he (plaintiff) left the neighborhood and was not to be found, but to infer from that that he intended to abandon the contract is a wrong conclusion. He might be intending to take a longer time for payment than was

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fair and he did take so long a time as to disentitle him to specific performance."

In *Whitla* v. *Riverview Realty Company,* 19 M.R. 746, the delay was not so great as that here. As I read the judgment of the learned Chief Justice of this Province he considered the defendants' cancellation proceedings to have given them a right under the contract and he held that owing to plaintiff's delay he had not shown circumstances to lead the Court to set aside that right in his favor. In that view the judgment of the learned Chief Justice may not be exactly in point here, as in the present case there was no cancellation provision or, if such, it was not complied with. But nevertheless it shows that, in such circumstances of laches, equitable remedies are not to be accorded. Dealing with the case cited from the standpoint of a purchaser's equity to specific performance, Richards, J. A., said: "If the defence of laches had been duly raised the plaintiff would perhaps have been held to have lost the right to specific performance." Perdue, J. A., uses similar language. Cameron, J. A., in this connection mentioned *Mills* v. *Haywood,* 6 Ch.D. 202, where Cotton, L. J., said: "It is a well established principle, as laid down by Lord Alvanley in *Milward* v. *Earl Thanet,* 5 Ves. 720 n., that a party cannot call upon a Court of Equity for specific performance unless he has shown himself ready, desirous, prompt and eager."

In *Mills* v. *Haywood* specific performance was refused because of a delay similar to that here.

Although circumstances may differ and each case requires individual consideration, there are no explanations or grounds of excuse whatever in the present case.

I do not consider that the defendant is entitled now to specific performance and, as I have indicated, to support his contentions would be equivalent to granting the defendant that relief.

As far as appeared from anything that transpired be-

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fore me, the plaintiff is not the registered owner of the land. I do not see how she can have any right to ask the Court to rectify the register of titles by directing the removal of the caveat in question.

Were it not for *Cornwall* v. *Henson* (*supra*), I should have held that the defendant had abandoned the contract, but it seems to me that that case precludes me from so holding.

All I can do is to declare that the defendant is not entitled to specific performance of the agreement in question.

I have nothing to say as to any rights the defendant would have at law under the contract, as, for instance, for damages. No such question is raised.

As to costs, I follow the view of Anglin, J., in *Labelle* v. *O'Connor,* 15 O.L.R. 519, and direct that plaintiff have costs on condition that she credit thereon the cash paid her by defendant upon the contract, less any sum she may have paid for finding the purchaser and her expenses incident to the agreement. Should the defendant subsequently seek damages, this application of the cash payment would doubtless be taken into consideration.

Both parties appealed.

A. Haggart, K.C., for defendant cited *Amer. & Eng. Encyc.,* vol. 29, p. 726; *Dart on V. & P.,* 289; *Shaw* v. *Foster,* L.R. 5 H.L. 321; *Lysaght* v. *Edwards,* 2 Ch. D. 499; *In re Dagenham Docks Company,* L. R. 8 Ch. 1022; *Barlow* v. *Williams,* 16 M.R. 164; *Canada Furniture Company* v. *Johnson,* 18 M.R. 590; *Whitla* v. *Riverview,* 19 M.R. 749, and *Fry on Specific Per.* 542.

A. W. Morley for plaintiff cited *Halsbury,* vol. 7, p. 22; *General Billposting Co.* v. *Atkinson;* [1909] A.C. 118; *Davis* v. *Bomford,* 6 H. & N. 245; *Morgan* v. *Bain,* L.R. 10 C.P. 15, and *Bond* v. *Walford,* 32 Ch. D. 238.

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RICHARDS, J.A.

RICHARDS, J. A. The facts are fully set out in the judgment of the learned trial judge.

It seems to me that the contention, that the giving of the notice of 9th January, 1906, by the plaintiff to the defendant, did wholly away with the provision in the contract that time should be of the essence of the contract, is untenable. In *Parkin* v. *Thorold,* 16 Beav. at p. 71, the Master of the Rolls did express such an opinion, but that view has been since held erroneous by Lord St. Leonards and by Jessel, M. R. The latter in *Barclay* v. *Messenger,* 30 L.T. 354, held that such an extension of time only substitutes the extended time for that originally fixed, without in any way doing away with the provision that time is to be of the essence of the contract.

Whether the attempt to make the first postponed payment, four months or so after the time as extended by the notice of 9th January expired, was too late to enable the defendant to then insist on specific performance of the contract by the plaintiff, need not now be considered. The return of the money by the plaintiff to the defendant, with a statement that she considered the contract cancelled and would not carry it out, was notice to him that she considered it at an end. Nevertheless he then waited several years before making any claim, except by filing a caveat, and in fact made none until brought into Court by the plaintiffs bringing this action. Even the mere making or persisting in a claim would not in itself have made his position better.

I take the law to be as stated in *Parkin* v. *Thorold* in that respect, where Lord Romilly says, at page 73: "If one of two parties to a contract for the sale of land gives to the other notice that he will not perform the contract, and the person receiving the notice does not, within a reasonable time after the receipt of such notice, take steps to enforce the contract, equity will consider him to have acquiesced in the abandonment of the contract and will leave the parties to it to their remedies at law."

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RICHARDS, J.A.

The word "abandonment," used by the noble and learned Lord in the above quotation, is perhaps too wide an expression. He only means by it an abandonment of the right to claim specific performance. The words following that word distinctly show that that only is his meaning.

The result is, I think, that the defendant should be held, as he has been, as I understand it, by the learned trial Judge, to have no further claim whatever upon, or rights in, the land; but we cannot now say that the contract should be rescinded. The defendant may have common law rights to sue for damages, which nothing but the lapse of time under the statute of limitations might interfere with. The plaintiff in this action has asked to have the caveat which the defendant filed taken off record. As between the plaintiff and defendant I can see no reason why that should not be ordered; but the power to deal with caveats is limited by The Real Property Act itself.

Section 138 of that Act says: "In case of any caveat filed * * the applicant or owner may, at any time before the caveator has taken proceedings thereunder, apply to the Court or a Judge or a Judge in chambers * * calling upon the caveator to show cause why such caveat should not be discharged." It will be seen that the right to apply is limited to the "applicant or owner." There was not a tittle of evidence given in the case to show that the plaintiff was the owner of, or had any title to, this land, legal or equitable. She does, in one place, speak of having purchased it; but evidence of title cannot be given in that way. She, therefore, cannot be held to have shown herself the owner. The word "applicant," as I understand it, in this section refers only to a party applying to bring the title to land under The Real Property Act. It might be possible for the plaintiff, if she has an equitable title, to get the holder of the certificate of title to apply to have the caveat removed; but I express no

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opinion as to the method of doing that, as it is not now in question.

I think both appeals should be dismissed. But I agree with the conclusion arrived at by my brother Perdue as to the clause to be added to the judgment of the trial Judge.

The defendant to pay the costs of his appeal. No costs of the plaintiff's appeal to either party.

PERDUE, J. A. The facts of this case are set out in the judgment appealed from. The agreement contained a clause providing that in case the purchaser should make any default the vendor might, on delivering or mailing a notice call upon the purchaser to make payment within a calendar month, and, on the failure of the purchaser to make payment within that time, the contract should be void and all rights of the purchaser under the agreement should cease, and the purchaser should have no right to reclaim moneys theretofore paid under the agreement.

It was clear from the evidence and was in fact conceded on the argument that the vendor had failed to comply with the terms of this clause and that consequently she was not in a position to avail herself of it.

The contract, however, contains a further clause in these words: "And it is further agreed that time is to be considered the essence of this agreement." The question therefore is, what is the effect of this last provision in regard to the rights of the purchaser?

Under section 39, s-s. (*m*), of the King's Bench Act, "Stipulations in contracts as to time or otherwise which would not, before the passing of 'The Queen's Bench Act, 1895,' have been deemed to be or have become of the essence of such contracts in a court of equity shall receive in all courts the same construction and effect as they would, prior to the passing of 'The Queen's Bench Act, 1895,' have received in equity." The rights of the parties, therefore, and the remedies to be accorded to them

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in this case, will depend upon the principles declared by the courts of equity. The nature of the equitable jurisdiction is thus described by Lord Cairns in *Tilley* v. *Thomas*, L.R. 3 Ch. 67: "A court of equity will relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract either for completion or for the steps towards completion, if it can do justice between the parties and if (as Lord Justice Turner said in *Roberts* v. *Berry*, 3 De G.M. & G.) there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract." Courts of equity held they were not concluded by the letter of an agreement to do some act within a given time and, where the party in default came before the Court with a sufficient excuse for non-compliance with the contract and there was no unreasonable delay upon his part, relief might be granted to him. See *Williams on V. & P.* 2nd ed. 58, 59.

In the present case the defendant made default in paying the instalment which fell due on the 1st of December, 1905. The plaintiff appears to have written to him on several occasions demanding payment but without effect, and on the 9th of January, 1906, she wrote him a letter, which was duly received by him, referring to the default and to the letters she had written him and then stating: "I now give notice, if payment is not forthcoming within thirty days after receipt of this, the agreement will be cancelled and all your rights, title and interest in lot null and void."

As previously stated, this letter must be held not to have been a compliance with the condition relating to the cancellation of the contract and the retaining of the purchase money, but it was good as a notice calling upon

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the defendant to make his payment in accordance with the terms of the agreement or that the agreement would be cancelled. It was in effect an extension of the time for payment of the overdue instalment, until after the lapse of thirty days from the receipt of the notice. The defendant failed to comply with this notice and did not for several months make any tender of the moneys that were overdue.

It was argued that the plaintiff, by calling upon the defendant for payment and by extending the time by her letter of January 9, 1906, had waived the condition as to time being of the essence of the contract, at all events, as regards the then overdue payment. It appears to me that the effect of the letter was that, notwithstanding the time that had passed, the plaintiff was still willing to give the defendant the further time to pay up, that the extension of time only waived the provision as to the essentiality of time during the extended period and that on the termination of that period it again revived.

In *Barclay* v. *Messenger,* 43 L.J. Ch. 449, 456, Jessel, M.R., thus expresses the equitable rule to be applied: "If a man says a contract is to depend upon a payment of money by a certain day and the party entitled to receive the money says, 'I will extend your time; I will give you a week or a month,' why that should put the party in a better position than if it had been originally put in the contract I cannot conceive. It appears to me plain that a mere extension of time and nothing more is only a waiver to the extent of substituting the extended time for the original time and not a total destruction of the essential character of time."

I think the judgment of the trial Judge was right in holding that the defendant by his delay had waived all rights to specific performance, that is to say, if the defendant had asked for specific performance in this case, which he has not done, the court would have refused it.

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I think the trial Judge might have gone further and have declared that the defendant's right under the contract had been forfeited. If the defendant is no longer entitled to specific performance by his delay in the case, he would also be disentitled under the same circumstances to claim damages for non-performance. It may be that the purchase money he had already paid has not been forfeited, but that has been allowed to him by the trial Judge, the plaintiff's costs being set off against it *pro tanto*.

I think that, in order to put an end to any further litigation and in order to clear the plaintiff's title, there should be added to the judgment of the trial Judge a clause declaring that the defendant's rights under the contract, in so far as the land is concerned, have ceased and are at an end.

The judgment of the trial Judge will be varied in accordance with the foregoing and the defendant's appeal will be dismissed with costs. There will be no costs of cross appeal.

HOWELL, C. J. M., and CAMERON, J. A., concurred.

IN THE COURT OF APPEAL.

MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Building contract—Covenant for payment on completion to satisfaction of engineer—Final certificate of engineer—Work not completed.

The defendants covenanted with the plaintiffs that, if the work the plaintiffs were to do should be duly and properly executed and completed to the satisfaction of the engineer, the defendants would pay the plaintiffs the amount provided for in the contract, which was for the construction of a dam across the Assiniboine River "with sheet piling so as to constitute a water tight plane." The contract further provided as follows: "So soon as the contractor shall have completely fulfilled the contract requirements, the engineer shall forthwith so certify in writing to the parties, and thereupon it shall be deemed that the purchaser (defendants) have taken over the work."

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According to the evidence the plaintiffs failed to construct the dam so as to make it water tight. They relied, however, upon a certificate given by the engineer setting forth the full amount of the contract price with debits and credits as if all the work had been performed, but concluding with the expression, "Retained pending repairs, $500," and concluding as follows: "We hereby certify that the above statement amounting to $6607.66 is correct and has not been previously certified." It was not stated in the certificate that the work had been duly performed, fully executed or completed; or that it had been done to the satisfaction of the engineer.

Held, 1. The engineer had no power to give such final certificate at the time he did, as the contractor had not completely fulfilled the contract requirements as the certificate itself showed.

Davidson v. *Francis*, (1902) 14 M.R. 141, and *Canty* v. *Clark*, (1879) 44 U.C.R. 222, followed.

2. The plaintiffs not having fully completed the work could recover nothing in this action.

Brydon v. *Lutes*, (1891) 9 M.R. at pp. 471-472, followed.

3. In this action, which was to recover the balance unpaid of the whole contract price, the plaintiffs could not recover in respect of the balance remaining unpaid of the progress estimates issued from time to time by the engineers.

Tharsis v. *McElroy*, (1878) 3 A.C., per Lord Cairns at 1045, followed.

DECIDED: 18th March, 1912.

Statement.

IN this action plaintiffs, contractors, sought payment of moneys under a building contract, and damages for alleged mis-representations in the same matter.

The following judgment at the trial was delivered by

ROBSON, J. An agreement dated 26th October, 1909, was entered into between plaintiffs and defendants for the undertaking by plaintiffs of the erection of a dam across the Assiniboine River near Portage la Prairie, for the sum of $10,536.

Some extensions or alterations were decided upon and a further agreement, dated 1st November, 1909, between the same parties entered into, the consideration being $17,400. Provision was made for payments according to progress estimates of defendants' engineers. Completion to the satisfaction of the engineers was a condition precedent to the right to final payment.

The plans, specifications and design of the work had

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been produced for defendants by Messrs. Smith, Kerry & Chase. These gentlemen acted as defendants' engineers under this contract throughout.

Payment of some progress estimates has been made but further payment is withheld on the ground, as alleged, that the work has not been completed according to contract.

The plaintiffs now claim under the contract $5,110. They base their demands upon a writing signed by the engineers, dated 2nd August, 1910, Estimate No. 8, (part of Exhibit 6).

It can hardly be pretended that this writing is a certificate of final completion. It refers to defective work on sheet piling and sluiceway, and purports to retain a portion of the contract price pending repairs: See *Davidson* v. *Francis,* 14 M.R. 141.

Nor can the writing referred to be treated as a progress estimate. Several judicial definitions of progress certificates are set out in *Hudson on Building Contracts,* vol. I, p. 378, and may usefully be referred to in this connection. Item 19 of the specifications describes progress estimates as being "for work completed during the previous month." The supposed estimate is not made up on any such basis. It is merely a proposal by the engineers that the stipulated contract price be paid to the contractors with the return of their deposit, less an amount to be retained to ensure their remedying certain defects. This was a procedure in no way contemplated by the contract.

In *Brydon* v. *Lutes,* 9 M.R. 463 at 471, Killam, J., is reported as follows: "It appears to me to be absolutely against both principle and authority to admit the proposition that, where work is to be done in a specified manner, and to be paid for upon completion, and it is done in a different manner or so defectively as to justify an allowance for the defects, and where the party for whom it is done refuses to acquiesce in the variations or defects or to accept the work, but simply takes the position that the

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workman must perform it according to the express stipulations and perfectly, and interposes no obstacles to this being done, the workman can recover before this is done."

Without power to acquiesce in defective work, the engineers can do nothing but insist on completion of the contract. The supposed estimate of August 2 was of no effect unless adopted by the defendants.

Plaintiffs set up clause 10 of the specifications, which provides that, should the works fail to meet the requirements of the contract, the contractor shall first have the right to remedy the defect or to repair, reconstruct or replace the faulty work, and that without delay he shall carry out the order of the engineer in that respect: that, should the contractor fail to carry out promptly such orders of the engineer, the defendants might (1) replace the defective work, or (2) take over the faulty work or defective work, making settlement therefor in a gross sum less than that computed under the terms of the contract by an amount to be decided upon by the engineer. Plaintiffs say that the work was taken over under this clause at $518 less than the contract price, that amount being decided upon by the engineer.

But this allegation is not supported in fact in that there is no evidence of taking over of the work by defendants. The assessment of the cost of repairing the defects at $518 was not done under clause 10 just quoted. There is no authority in the engineers to take over the work under that clause, even if it could be said that they had assumed to do so, which is by no means clear.

A further contention of the plaintiffs is that the engineers were disqualified from acting as quasi-arbitrators between the plaintiffs and defendants; that plaintiffs are therefore relieved from the necessity of satisfying the engineers as to the completion of the contract; that in fact the work was completed and plaintiffs should therefore recover.

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ROBSON, J.

This is an important issue, involving facts as well as law. It was not raised on the pleadings and I cannot say that an amendment now to raise it would not prejudice the defendants.

One alleged ground of disqualification of the engineers is that the engineers or their employee had made a preliminary estimate of what the work should cost and *Kemp* v. *Rose,* 1 Giff. 258, was cited. In *Kemp* v. *Rose* the architect had given to the owner an assurance that a building would not cost more than a certain sum and on the faith of this the owner proceeded. Under these circumstances the architect's decision was held not to be binding upon the builder. In the present case the estimate was made by Riddell, the inspector of works under the engineers, and was not the basis of any action of the defendants. The element present in *Kemp* v. *Rose* of an assurance to the owners as to cost was absent here.

Then it is said that the engineers are virtually defendants here and are interested in resisting plaintiff's claim. This is because they have been served by defendants with a third party notice under rules 245 and 246 and have appeared thereunder and deny plaintiff's claims. At the time of the supposed estimate of August 2nd (Exhibit 6) the engineers seem to have been acting fairly enough. The defects mentioned in that Exhibit were admitted by defendants, the only question being the amount necessary to repair them.

The only action of the engineers which causes any comment in this connection took place after Exhibit 6 was written by them to the defendants. At the date of that letter, and as appears thereby, the engineers had learned to their "serious disappointment and yours, that the fine sand and silt forming the bed of the River above the clay is so impalpable that it is slowly being washed through the cracks in the sheet piling by the small leakage, which may be considered unavoidable. The effect

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of this flow through the structure is, and will probably continue to be, the removal from within the structure of a portion of the silt there enclosed by the sheet piling. The result of this is to allow the stone filling to settle to the clay. As we could desire and until further work has been done, we cannot allow the full head to be put upon the dam." The engineers evidently did not then attribute this condition to the defects mentioned in plaintiff's work.

They, however, sought to retract Exhibit 6. They had altered their views as to the effect of the faults referred to. On 22nd August, 1910, they wrote a letter to the plaintiffs in which, after mentioning the defects, they say: "The result of these defects has been that large quantities of material which formed the foundation of the dam have been washed away and the structure has been seriously damaged thereby."

The engineers may have been brought to this change of view in good faith by closer examination of the work as they say. Any issue questioning that is too important to be considered without its being formally raised on the record.

Be this all as it may, could the remainder of plaintiffs' contention be supported? Was there such completion of the work that, with the engineer out of consideration, the plaintiffs could recover?

It is contended on behalf of the plaintiffs that the two defects named are mere trivial faults which might be remedied at small cost. The effect of trivial omissions is considered in *Hudson on Building Contracts,* vol. I, p. 274.

If I were at liberty to consider the character of the defects, I would, subject to deduction of $18, ignore the item regarding plank walk over sluices mentioned in Exhibit 6 as being a trivial omission, but could not so treat the defects in the sheet piling and sluiceway.

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RONSON, J.

It may be said here as it was in British Columbia, *McDonald* v. *Simons,* 15 W.L.R. 218, "The doctrine of substantial performance, which has found favor in some of the United States of America, has no place in our jurisprudence": *Hudson,* vol. 1, p. 274, and *Brydon* v. *Lutes, supra.*

Clause 7 of the contract gave the engineer power to omit any portions of the work. Clause 10 authorized him in that case to make the consequent deductions. If by means of these provisions the omission to remedy the defects could be overcome, I would apply them to that end. But I do not construe these provisions as authorizing the acceptance of defective workmanship, even subject to deduction. In this connection, reference may be made to *Rex* v. *Peto,* 1 Y. & J. (Ex.) 37.

It appears from the letter from defendants to the engineers of 3rd February, 1909, (Ex. 21) that the engineers were placed in charge of the construction of the work which they had designed. It might be thought from that that the engineers had some general authority besides that specified in the contract, and that on behalf of the defendants they closed matters with the contractors when the estimate of August 2nd was arrived at. In my view, however, this should be construed as meaning that the engineers were to see that the work was done according to the designs and not as giving authority to depart therefrom.

I cannot find that there has been, to use the language found in *Hudson,* vol. I, 274, any act of the employers, such as acceptance, waiver or prevention, or that there is any evidence from which a new contract can be implied to pay for the work as performed and according to value, although not entirely completed.

Various expressions of the engineers and the inspector show that the plaintiffs made an honest and intelligent attempt, in the face of considerable difficulty, to dis-

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charge their contract. While it may not be of any value to them, I will say that, with the admitted exceptions, I think their work was thoroughly done. It is regrettable though, as it seems to me, unavoidable that it must be held that under the form of contract the plaintiffs entered into they cannot recover the balance they now seek.

The plaintiffs advance certain other causes of action. These are based on alleged representations and warranties by the defendants relied on by plaintiffs that the bed of the River, wherein the work was to be done, was of the formation and material indicated upon plans submitted by the defendants and that the character of the dam specified was such that it would be water tight. It is alleged that these representations were untrue and the warranties broken, and that the plaintiffs suffered great loss thereby in the increased difficulty and expense of the work, and $8,000 damages are claimed.

There is no express warranty of any such character contained in any of the writings forming the contract. One of the plans, incorporated in the contract, contains an approximate indication of the surface of the ground. Plaintiffs say this was a representation on which they relied. In fact, when the plaintiffs went to work they found that the river bed was not as indicated, the serious matter being the existence in the southerly portion of the River of an unsuspected bar of sand of considerable width. There is no doubt this bar greatly impeded plaintiffs' operations and involved them in heavy unforeseen expenditures.

The plan in question is dated 7th December, 1908, so it was made on data secured before then. The formation of the river bed is changeable. Sand is carried by the river and bars form and move with its various fluctuations. If a representation at all, the plan can only be so taken as of its date. There is no evidence from which

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it can be said that it did not truly show the conditions then.

The tender signed by the plaintiff Merriam and included in the contract contains the statement: "I have visited the site of the works and have examined fully the conditions which will affect the cost to me of this job." This was apparently put before that plaintiff for his signature. Surely it was an intimation to him that he was to rely on his own inquiries. The idea of warranty could not have been more plainly negatived.

In *Hudson on Building Contracts,* vol. I, pp. 81-83, will be found reference to a number of authorities on this subject. A quotation will be found at p. 81 from the judgment of Brett, J., in *Bottoms* v. *York Corporation,* II Hudson, 220, as follows:

"If the proposition is that the thing shall be done in a particular time, it does not seem to me unreasonable to say that he must consider and calculate for himself whether the proposed work can be done within the time; and it is but a step further to say that he must consider also for himself and calculate whether the work can be done at all, so as to enable him to earn the price to be paid. I think it may be said that both parties must make their own calculations; that, if the contractor finds that the employer is proposing to him something which cannot be done, he ought not to offer to do the thing which, in his mind, cannot be done; and if he does not enquire into the matter, or runs the risks, he must take the consequences, or, if he thinks it doubtful, he ought to correct the agreement by an express covenant."

The plan containing the supposed representation indicates that it was prepared by the engineers. Correspondence on the subject of the specifications and formation of the river bed took place between the plaintiffs and the engineers before the contract was signed.

In *Hudson,* vol. I, at p. 83, the author says: "The duty of the contractors is to see for themselves if they can perform the work or not and, if they rely on the

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skill of the engineer employed by the building owner or employer, they must do so at their own risk." And he follows this with the quotation from the judgment of Lord Chelmsford in *Thorn* v. *London Corporation*, 1 A.C. 120: "It is also said that it is the usage of contractors to rely on the specification and not to examine it particularly for themselves. If so, it is a usage of blind confidence of the most unreasonable description."

In this case it does not seem to me that the plaintiffs have made out either that a warranty was given or that the plaintiffs relied on any supposed warranty. Nor, as has been said, does it appear that the plan did not give a fair approximation of the line of the surface of the river at the date of the plan.

No doubt the unexpected obstacle found in the condition of the bed of the river caused the contractors to lose time and thereby exceed the period allowed by the contract, involving them in the charge for the service of the engineer during the unauthorised delay. They claim to be paid $490.85, which has been deducted from interim estimates to meet this charge. But it seems to me the words of Brett, J., quoted above from *Bottoms* v. *York Corporation* completely answer that demand. It is to be noticed that, if additional time was necessary by reason of extras, the certificate of the engineer therefor was required under clause 3 of the contract, but was not obtained.

The defendants counterclaim: firstly, $2,000 under clause 12 of the contract, whereby the contractors covenanted that if the dam should not be completed before the spring floods of 1910 a bond for $2,000 to be furnished by the contractors should be forfeited. It is apparent from clause 29 of the contract that this security of $2,000 applies to every phase of the contract. It is not an assessment by the parties of the damages in case of failure of completion by the day named. I think the $2,000 pro-

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vision is in the nature of a penalty and the defendants can recover only such damages, if any, as they have actually sustained by reason of the non-completion. The measure of these damages comes up for consideration in the second branch of the counterclaim in which defendants claim $14,343.28, being the sum paid by them to date to the plaintiffs on progress estimates. They allege that, under the contract, plaintiffs had the care of the works until completion; that, by reason of want of completion of the work by plaintiffs and of negligence on the part of the plaintiffs, the structure in question collapsed and became of no value to the defendants. These allegations are denied by the plaintiffs.

The moneys paid on progress estimates were lawfully payable to the plaintiffs under the contract. A case has not been made for recovery as upon failure of consideration nor would the evidence justify it. I have not been referred to any authority declaring that the amount so paid may be taken as the measure of damages to be awarded to an owner against a contractor in case of non-completion. To cite from *Hudson on Building Contracts* again, it will be found at page 496, vol. I, that the author submits that the measure of the damages for breach of a building contract is the difference between the contract price of the work contracted for and the cost of making the work conform to the contract, plus the loss of earning power or user during the period of delay in rebuilding or alteration. No case has been made for recovery by defendants on this basis. I am not inclined to widen the scope of the counterclaim.

Both action and counterclaim must be dismissed with the usual result as to costs.

Plaintiffs appealed.

H. J. Symington for plaintiffs, appellants, cited *Lapthorne* v. *St. Aubyn*, 1 C. & E. 486; *McGreevy* v. *Boomer*, Cassel's Supreme Court Digest, 1880, p. 139; *Hudson on*

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Argument.

Building Con., vol. I, pp. 387, 393; *Clemence* v. *Clarke*, Hudson on Building Con., vol. II, pp. 41, 45, 55; *Whiteman*, v. *New York*, 21 Hun, 117; *Bateman* v. *Thompson*, Hudson on Building Con., vol. II, pp. 23, 31; *Kemp* v. *Rose*, 1 Giff. 258; *Nuttall* v. *Manchester*, 8 T.L.R. 513; and *Pearson* v. *Dublin*, [1907] A.C. 351.

A. B. Hudson and *E. P. Garland* for defendants, respondents, cited *Davidson* v. *Francis*, 14 M.R. 141; *Canty* v. *Clark*, 44 U.C.R. 222; *Walker* v. *Black*, 5 V.L.R. 77; *Rex* v. *Peto*, 1 Y. & J. 36; *Cockshutt* v. *Alberta*, 2 Alb. R. 472, and *Grace* v. *Osler*, 21 M.R. 641.

A. E. Hoskin, K.C., for third parties, the engineers.

HOWELL, C. J. M. The facts in this case are fully set out in the judgment of Mr. Justice Robson, who tried this cause.

Section 25 of the contract provides for payment for this work, and is as follows:

"25. Said purchaser covenants with the said contractor that if the said work, including all extras in connection therewith, shall be duly and properly executed and completed as aforesaid to the satisfaction of the engineer, and if the said contractor shall observe and keep all provisions, terms and conditions of this contract, the purchaser will pay to the said contractor the sum as hereinbefore mentioned in the manner and at the times mentioned in the specifications upon estimates and certificates signed by the engineer and such further sum or sums for extras as may be certified to by the engineer as being due and owing to the said contractor."

The only provision in the specifications as to certificates is the following:

"18. Payments, each 85 per cent. of the amount of the estimate, will be made on or about the 15th of each month, upon progress estimates to be issued by the engineer on or about the 3rd of the month, for work completed during the previous month."

It is difficult to give an intelligent construction to these two clauses. The covenant in the contract is for

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payment upon completion to the satisfaction of the engineer; the provision in the specification is for payment from time to time before completion.

The plaintiffs simply sued on a completed contract and allege that they obtained a final certificate within the provisions of the above section 25.

The contract was one to construct a dam across the Assiniboine River with sheet piling so as to constitute a water tight plane so that the water would be diverted to an old river bed at Portage la Prairie. The structure which the plaintiffs claimed they had completed certainly did not hold the water of the river and, from the evidence, I would not have expected it to be to the satisfaction of the engineers. Stevens, the Chairman of the Board, saw the work a day or two before the alleged final certificate was given and, if his evidence is to be relied upon, I would not think the engineers should be satisfied. Smith, one of the engineers, saw the work two weeks after that certificate was given and he swears that he then told the plaintiffs the following: "I told them that the work was not completed satisfactorily," and he also describes the then condition of the work.

Ruddell, the agent of the engineers, the man on the work, also describes its condition when the water was raised by the stop logs, and it certainly then—about the time the certificate was given—had not much of the qualities of a dam, and could not be called a water tight plane as required by the specifications.

On the 2nd of August the plaintiffs had withdrawn from the work and claimed they had fulfilled their contract, and were entitled to their money. On that day they went to the engineer's office for their final certificate. Objections to the work were made by Mr. Chase, one of the engineers, and on reference by him to Ruddell it seems clear that the engineer thought something more should be done to complete the work. After some hag-

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gling, he decided that the sum of $500 should be retained out of the contract price and a certificate was given setting forth debits and credits as if all the work had been performed, but containing this charge against the plaintiffs: "Retained, pending repairs, $500." After making this charge, the balance is brought out in favor of the plaintiffs of $6,607.66, and then follows: "We hereby certify that the above statement, amounting to six thousand, six hundred and seven 66/100 dollars is correct and has not been previously certified." There is no statement in the certificate that the work has been fully executed or completed and nothing respecting the satisfaction of the Engineer. The certificate starts out as follows: "For work done by Messrs. Merriam & Symington up to 31st July, 1910."

There is no statement in the document that the certificate is a final one and, on the contrary, there is a direction to retain part of the contract price until certain repairs are made, which apparently the plaintiffs should have done. I would also infer from this that the plaintiffs had not done the work to the satisfaction of the engineers.

It was argued that, as the engineers had power to change the plan and design of the work by omitting certain portions of it, the certificate should be read as if the unfinished part of the work had been dropped from the design and that it was thereby a completed work satisfactory to the engineers. It cannot be said that this defective work was directed by the engineers to be so done or changed or omitted as provided by section 10 of the contract.

Section 10 of the specifications clearly limits the time and manner in which the engineer shall grant this certificate. It is as follows:

"So soon as the contractor shall have completely fulfilled the contract requirements, the engineer shall forth-

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with so certify in writing to both the purchaser and the contractor and thereupon it shall be deemed that the purchaser has taken over the works."

This provision has not been complied with, for the engineer has not certified that the contractor has completely fulfilled the contract requirements.

I agree with Mr. Justice Robson that the engineers had no power to give a certificate final in its nature until the work was completed and to their satisfaction. If authority is required for this proposition it will be found in *Davidson* v. *Francis,* 14 M.R. 141, and in *Canty* v. *Clark,* 44 U.C.R. 222.

To recover on the statement of claim the plaintiffs must prove the completion of the work and the satisfaction of the engineers and must produce their certificate issued under the terms of the agreement and specifications. The plaintiffs have failed in this and cannot recover for the contract price.

Although not raised on the pleadings the plaintiffs claim that, during the progress of the work, progress certificates were from time to time issued and there is a balance due on them, and they ask now for a verdict for this amount.

It seems to me they cannot recover for this balance, even if a case had been made for it on the pleadings. Their case on the pleadings is that the work is completed, and now it is quite impossible to finish it because of its almost absolute destruction. They entirely withdrew from the work and asserted it was finished.

After the engineers had withdrawn their certificate, Mr. Smith asked Mr. Symington to make the dam reasonably water-tight, but he refused and asserted his right to stand on the certificate as a final one. The engineers shortly afterwards called upon the plaintiffs to complete the work, but they refused.

The position of the plaintiffs is that they assert the contract is completed, and will do no more work.

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This is not a case of suing for a claim under a progress certificate while the contract is current and is being performed, but it is a claim for part payment when, because of non-fulfilment, nothing is payable to the plaintiffs. If, after a progress estimate is issued and before payment, the contractor had abandoned the work he could not recover on the contract because he had abandoned it, and it seems to me that is practically the plaintiffs' position.

The provision in the specifications as to progress estimates above set out is only for provisional payments subject to adjustment or to re-adjustment at the end of the contract, as held by Lord Cairns in *Tharsis* v. *McElroy*, 3 A.C. 1045. And it would be strange if now at the end of this contract, when the plaintiffs are entitled to nothing because they have not complied with its terms, they could recover on an estimate given when the contract was in force and all parties expected it would be carried out.

The claim of the plaintiffs because of misrepresentation as to the river bed has been fully considered by the learned trial Judge, and I fully agree with him.

The appeal must be dismissed with costs.

RICHARDS, J. A. I agree with the learned trial Judge that the doctrine of substantial performance seems not to be applicable under the English decisions. The question to my mind simply is whether the engineers have given a final certificate and, if they have, whether they had power to do so.

The certificate of 2nd August was, in my opinion, meant to be a final certificate. It begins by crediting the plaintiffs with the whole contract price. It directs the repayment to them of their deposit given as security for the performance of the work and also directs payment to them of $2,000, which had been held back from the estimates as further security.

There is no magic in the particular wording of a final

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certificate. It is sufficient that it shows on its face that it was intended to be a final one. For example, in *Clarke* v. *Murray,* 11 Vic. L.R. 817, a certificate that the contractor was entitled to receive a named sum with the words: "This being the final certificate in full of all demands," was held to be a certificate that the whole of the work was completed to the satisfaction of the architect. In *Wyckoff* v. *Meyers,* 44 N.Y. 143, the contract provided that the last instalment of the contract price was to be paid "when all the work is completely finished and certified to that effect by the architect." The architect gave a certificate which reads: "This is to certify that the last payment of $1,800 is due * * as per contract." This was held to be in effect a certificate that the work was completely finished.

There is, on the face of the certificate in the present case, the following: "Retained pending repairs, $500." The evidence shows that the work was completed, but that the flooring of the sluices up-stream from the stop logs was apparently not as tight as the engineers thought it should be; and some of the up-stream sheet piling they also thought not to be tight. The evidence further shows that the engineers decided that this might be remedied by boarding over the parts, and they further decided that they would not have this done by the contractors, but would themselves have it done or get it done otherwise. This is what the $500 was retained for.

The question arises whether the engineers had power to make these changes and then dispense with the doing by the contractors of what these changes called for.

The case relied on by the defence, it seems to me, is *Rex* v. *Peto,* 1 Y. & J. 37. In that case it was provided that the surveyor might order extra work to be done, in addition to what was shown in the plans and specifications, or might order that any part should not be done or executed. It was held that this did not give the sur-

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veyor power to alter the whole nature of the foundation of the building, as that was neither an ordering of extra work, nor the omitting of any part of the work contracted to be done, but was a substantial alteration and the contract gave the surveyor no power of alteration.

In the present case it is provided by section 7 of the contract that the engineer shall have the right to make or order any alterations or changes such as he may deem advisable * * or to omit any portion of the work, or to increase or decrease dimensions or quantity of materials or work.

By section 10 of the contract it is provided that, if any work or material which the contractor shall be required to perform or supply under the specifications, as directed by the engineer, be changed or omitted, whereby a less quantity of work or material is performed or supplied, then the engineer shall deduct from the contract price the value thereof.

Sub-section (*b*) of section 4 of the specifications says that it shall be within the rights of the engineer to issue plans and specifications further detailing, explaining or modifying the work.

Section 10 of the specifications says that so soon as the contractor shall have completely fulfilled the contract the engineer shall forthwith certify, and thereupon it shall be deemed that the purchaser has taken over the works.

It will be observed that the powers of the engineer are very wide as compared with those of the surveyor in *Rex* v. *Peto*.

It seems to me, though I express the opinion with a good deal of hesitation, that the powers of alteration and omission given by the contract and specifications would enable the engineers to make an alteration or change in the work by planking over such parts of the sheet piling and sluice floors as they thought proper. The evidence

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shows that, in their then opinion, such sheet piling and floors would then comply with the purpose of the contract. Then, they having so decided, and having the right to order a portion of the work to be omitted, it seems to me that they have ordered the omission of that part so to be altered and, that on their having done so, the contract was in fact completed as required by its terms, and that the engineers were empowered to give a final certificate, which, it seems to me, they did on the 2nd of August. Though the wording of the certificate is, as to the $500 item, "Retained pending repairs," the letter with the certificate, which I think may be read with it, shows that the item of $500 was really permanently deducted from the contract price, and not merely temporarily held back as against the plaintiffs. What it meant was that the $500 was deducted in respect of the work changed by the engineers and then by them omitted from the work to be done by the contractor.

Holding these views I would allow the appeal.

CAMERON, J. A. Under clause 13 of the specifications, the dam which the plaintiffs agreed to construct was to be water-tight. "All sheet piling to be so driven as to form a water-tight plane." The contract provides in section 1 that the contractor shall perform, execute and complete the works which by section 26 are defined to be the whole of the works, matters and things required to be done. By section 7 of the contract the engineer may make or order any alterations or omit any portion of the work or increase or decrease dimensions, &c., "and the contractor shall, in pursuance of the engineer's written orders to that effect, proceed with and carry out the works as directed in pursuance of such orders." Clearly the engineer, in giving the certificate of August 2, 1910, did not consider that he was, and in fact he was not, acting under this section. He gave the contractor no written orders to proceed as required thereby. Clause 6 of the

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specifications gives the Parks Board the right at any time to alter, deduct from, add to or omit any part of, the work without affecting the contract, which alterations the contractor shall carry out "upon written notice from the engineer." Obviously it cannot be asserted that the engineer was acting under this clause in giving the certificate of August 2, or indeed that a consideration of clause 6 enters into this case in any way.

The authority of the engineer in respect of this work is to be found altogether within the four corners of the contract (including therein the specifications), and by no fair reading of the contract can there be found in its terms power vested in the engineer to allow for work defectively done, or power to release the contractor from the performance of any essential part of the work required to be done thereby, and to assign the completion of any such part to himself or to others. The conclusion seems to me clear that the engineer had, under the contract, no authority to give the certificate of August 2, which was therefore ineffective and void, and must be disregarded.

It seems plain, also, that that document, inasmuch as it purports to withhold $500 of the contract price "pending repairs," is not final. Nor was it issued as, or intended to be, a progress estimate under clause 13 of the specifications, and it cannot be taken as such, as a reference to the wording of that clause clearly indicates.

The document of August 2 shows, on the face of it, that the work was not then complete and the evidence points strongly to the same conclusion. It is only when the works have been duly executed and completed to the satisfaction of the engineer and upon compliance by the contractor with all the provisions of the contract, that the "purchaser" covenants to pay. It is well established law that the contractor, to recover, must assert and prove strict compliance with the contract and specifica-

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tions. I refer on this subject to the judgment of Killam, J., in *Brydon* v. *Lutes*, 9 M.R. at pp. 471, 472. It seems to me that the plaintiffs have here failed to meet this essential requirement.

The judgment in favor of the plaintiffs in respect of the counterclaim made by the Parks Board has not been appealed against and stands.

I have read the judgment prepared by the Chief Justice in this matter and agree with his reasoning and conclusions. I think the appeal must be dismissed.

PERDUE, J.A., concurred with Howell, C.J.M., and Cameron, J.A.

Appeal dismissed.

IN THE COURT OF APPEAL.

CONLEY V. PATERSON.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Vendor and purchaser—Specific performance—Agreement of sale—Reference to more formal contract to be subsequently prepared—Statute of Frauds.

A receipt given by the vendor's agents to the purchaser for the cash deposit on the sale of land subject to the approval of the vendor, if it contains all the terms of the contract and is sufficiently executed to satisfy the Statute of Frauds, and if the sale is subsequently approved by the vendor, will be binding on him and the purchaser will be entitled to enforce specific performance notwithstanding the provision: "$1500 to be paid in cash *on execution of the necessary agreement of sale*" in the receipt and that there was no more formal agreement of sale executed afterwards.

Von Hatzfeldt v. *Alexander*, [1912] 1 Ch. 289; *Winn* v. *Bull*, 7 Ch. D. at 32; *Rossiter* v. *Miller*, 3 A.C. 1124, and *Munroe* v. *Heubach*, 18 M.R. 450, followed.

The signing of the receipt by the agents as "Agents for owner" was sufficient to satisfy the Statute of Frauds, although the name of the owner was not stated in it.

Rossiter v. *Miller*, 3 A.C. at p. 1140, followed.

DECIDED: 8th of April, 1912.

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ACTION by a purchaser for specific performance of an agreement of sale of land.

The facts are set out at length in the judgment of Perdue, J.A.

The case was tried before Macdonald, J., who dismissed the action as against Heubach, Finkelstein & Heubach but gave judgment in favour of plaintiff for specific performance as against other defendants, who appealed.

A. C. Galt, K.C., and *C. S. Tupper* for appellants cited *Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284; *Jarrett* v. *Hunter*, 34 Ch. D. 184; *Coombs* v. *Wilkes*, [1891] 3 Ch. 77, 80; *Winn* v. *Bull*, 7 Ch. D. 29; *Rossiter* v. *Miller*, 3 A.C. 1124, 1138; *Potter* v. *Duffield*, L.R. 18 Eq. 4, and *Hussey* v. *Horne-Payne*, 4 A.C. 311.

J. E. O'Connor and *A. K. Dysart* for plaintiff, respondent.

PERDUE, J.A. This is an action by the purchaser for specific performance of an agreement for the sale of a piece of land in the City of Winnipeg. The action is brought against Mr. Herbert Paterson, Messrs. Heubach, Finkelstein & Heubach, and Messrs. Black, Young and Jameson. The defendants Black, Young and Jameson are the executors and trustees under the will of the deceased father of the defendant Paterson, and the last named defendant is the beneficial owner of the land.

On the 18th of January, 1911, the defendants Heubach, Finkelstein & Heubach, real estate agents, gave to the plaintiff a document of which the following is a copy:

"January 18th, 1911.

"Received from George H. Conley, Commercial Traveller, Winnipeg, the sum of Five hundred ($500) dollars being deposit and part payment on the purchase of Lot one (1), D.G.S. One (1) Saint John, Plan 790, with

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house erected thereon and known as Number One (1) Saint Mary's Place, which Mr. Conley agrees to purchase on the following terms:—

The consideration to be ($8,500) Eight thousand five hundred dollars, Fifteen hundred ($1500) dollars including the above deposit to be paid in cash on execution of the necessary agreement of sale, three thousand ($3,000) dollars by the purchaser assuming and agreeing to pay mortgage for that amount to be placed upon the property forthwith by the vendor, such mortgage to bear interest at the rate of seven (7%) per cent per annum. The whole of said principal to be repayable at the end of five (5) years from date hereof, interest half yearly on the first (1st) of July and the first (1st) of January in each year. ($4,000) Four thousand dollars to be paid in consecutive half yearly payments of not less than three hundred and thirty ($330) dollars. The first of such payments to become due and payable on the first (1st) day of July, 1911, together with interest at the rate of six (6%) per cent per annum.

The purchaser to have the privilege of paying the whole or any additional amount on account of this sum of four thousand ($4,000) without notice, or bonus. Taxes and rent to be adjusted to date of sale hereon. The sale is made subject to the approval of the owner.

Heubach, Finkelstein & Heubach,
Agents for owner per T. D. Whiting."

At the same time they obtained from the plaintiff an agreement in writing to purchase on these terms.

At the trial the action was dismissed as against Heubach, Finkelstein & Heubach.

From what was proved in the evidence or admitted in the pleadings the following facts were established:

1. On 18th January, 1911, Messrs. Heubach, Finkelstein & Heubach, as agents of Paterson, agreed to

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sell the land to the plaintiff at a price named and on terms and conditions set forth, subject to the approval of the owner, meaning by "owner" the defendant Paterson.

2. The plaintiff paid at the time $500, and was given a receipt in writing by Heubach, Finkelstein & Heubach which set out the terms of the sale and was signed by them as "agents for owner."

3. The title to the land stood in the names of the defendants Black, Young and Jameson, who resided in Scotland and who held the land as trustees for Paterson, subject to a claim of about $3,000, on payment of which they were willing to convey the land to Paterson.

4. Heubach, Finkelstein & Heubach, as admitted in the statement of defence, "duly submitted the said offer to the defendant Paterson."

5. Paterson approved of the sale and requested the Winnipeg solicitor of the trustees to procure a transfer from the trustees.

6. The solicitor for the trustees prepared and forwarded to them an agreement of sale to be executed by them. This, although embodying the terms mentioned in the receipt, contained a number of provisions not referred to in the receipt.

7. The agreement so forwarded contained, by an error, a provision that the trustees should sign a mortgage for $3,000. This was contrary to the terms contained in the receipt, which clearly intended that Paterson should sign such mortgage, the object being to raise money to pay off the trustees.

8. By reason of the term providing that they should sign a mortgage, the trustees refused to execute the agreement.

9. The trustees were willing to convey the land to Paterson on being paid the amount due to them, and

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they proposed that he should carry out the sale himself, raising the money to pay them off.

10. While matters were in this position, circumstances arose which caused a great advance in the value of land. Finkelstein, one of the partners in the firm of Heubach, Finkelstein & Heubach, thereupon wrote to Paterson as follows: "Regarding house No. 1, St. Mary's Place, I find that somebody is buying up the property around your house, and I think that in all probability, if I am not tied up to the man with whom I was previously dealing, that is the man who made us the offer which we sent to you, that I will be able to get a great deal more for the property. I am, therefore, refusing on your behalf to carry out the transaction as outlined in our previous letters, as I feel that the people who are now buying the property will need it badly enough to pay many thousands more; in fact, I think we could get nearly twice as much as we formerly expected to get."

11. The defendant Paterson then refused to carry out the sale.

I think there was an agreement sufficient to satisfy the requirements of the Statute of Frauds. The signing by Heubach, Finkelstein & Heubach, as agents for the owner, was sufficient: *Rossiter* v. *Miller,* 3 A.C. 1140.

The only question of real importance that arises in the case is in reference to the provision: "$1500, including the above deposit to be paid in cash on execution of the necessary agreement of sale." It is urged that this provision showed that the receipt signed by Paterson's agents was only intended to indicate terms which might form the basis of a contract, but that the real contract was still to be settled and agreed upon.

The receipt which was given by Paterson's agents to the plaintiff contained all the terms of the contract. The writing contained sufficient, and was sufficiently executed,

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to satisfy the Statute of Frauds. The reference in the writing to "the necessary agreement of sale" can be explained by the fact that Paterson was still to approve of the terms and, on his doing so, it may have been contemplated that some document more formal in its nature, but containing the same terms, might be signed by both the parties. There is no suggestion that any new term was to be introduced. It is true that the payment of $1500 is to be made "in cash on the execution of the necessary agreement of sale"; but, upon Paterson giving his assent to the terms contained in the writing, the necessary agreement of sale was complete and could be enforced. It is to be observed that the mortgage to be put on the property is payable at the end of five years from the date of the receipt. I would take it that the term, "the necessary agreement of sale," referred to Paterson's approval and acceptance of the sale made by his agents in the absence of a more formal agreement taking its place.

The law upon this point is summarized by Jessel, M.R., as follows:

"It comes, therefore, to this, that, where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says: it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form or whether they should be subject to a new agreement, the terms of which are not expressed in detail": *Winn v. Bull,* 7 Ch. D. at p. 32.

In *Rossiter* v. *Miller,* 3 A.C. p. 1152, Lord Blackburn says: "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms though they were subsequently to have a formal agreement drawn up." See also *North* v. *Percival,* [1898] 2 Ch. 128.

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I think there was a concluded agreement in the present case which both vendor and purchaser had accepted. There was no term or condition remaining to be settled. Everything had been agreed to and put in writing. The agents may have thought a formal agreement necessary, but it was not necessary if every term and every condition of the sale were already in the writing signed by the parties, as was the case here. The only thing that disturbed the harmony of the transaction was the sudden increase in the value of the land. Then the vendor, at the instigation of his agents, sought to repudiate the sale in the expectation of getting a higher price.

I think the appeal should be dismissed with costs.

CAMERON, J.A. In my opinion there is a good deal to be said for the appellant's contention that the offer made by the plaintiff to Heubach & Co. was not the offer which Heubach & Co. transmitted to Paterson for his acceptance in their letter of January 20, 1911. The following points of difference (of varying degrees of importance) appear: (1) The letter says $1500 is to be paid in cash "as soon as the sale has been accepted by you." The receipt, however, says it is to be paid "on execution of the necessary agreement of sale." (2) The letter says the purchaser is to pay a mortgage to be placed on the property "by you." The receipt says "by the vendor." (3) The receipt says "The whole of said principal to be repayable at the end of five (5) years from date hereof, interest half-yearly on the first (1st) of July and first (1st) of January in each year." This is not to be found in the letter at all. (4) The word "consecutive" is found before the word "semi-annual" in the receipt, but not in the letter. (5) The receipt says that the first of the half-yearly payments is "to become due and payable on the first (1st) day of July, 1911." This is not expressly stated in the letter. (6) The receipt gives the purchaser the privilege of prepaying principal "with-

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out notice or bonus," but this ("without notice or bonus") is not stated in the letter. (7) According to the receipt, "The sale is made subject to the approval of the owner." But the letter says, "The sale being made already, subject to your approval."

These variations might be considered sufficient to support the argument that the offer submitted to Paterson was not the offer made to, and conditionally accepted by, Heubach & Co., that the minds of the parties never came together and that, therefore, there was no contract. But the defence has not made it a point to insist upon this view, as the admissions made in the statement of defence, in paragraphs 3 and 5 (in which it is stated that the agents duly submitted the said offer), apparently preclude this contention. It is further to be noted that paragraph 9 of the statement of claim (which is admitted by the defence) states that Paterson is the beneficial owner of the land in question and that the land (of which a full description is given) was agreed to be sold to the plaintiff.

The first objection taken to the judgment, that the vendor is not named in the offer, and that the contract is, therefore, insufficient under *Jarrett* v. *Hunter,* 34 Ch. D. 184, must fail in view of the fact that Heubach & Co. sign as "Agents for owner" and the sale is expressly made subject to the owner's approval.

The second objection was that the contract upon which the action was brought was merely a contract for a contract, and, therefore, not actionable. Counsel for the defendants rely upon the provisions in the contract making the $1500 payable "on the execution of the necessary agreement of sale." But all the terms are set forth in the offer of January 18th, and the expression of them in a more formal document was not intended as a condition or term of the bargain to be performed before the bargain came into existence. That I think is plain.

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That being so, there is a binding contract and the reference to a more formal instrument may be ignored: *Von Hatzfeldt-Wildenburg* v. *Alexander,* [1912] 1 Ch. 289.

It was urged in the next place that the offer was not accurately quoted to Paterson, but this objection must be overruled for reasons I have already pointed out.

It was further urged that the acceptance by Paterson was an acceptance conditional only upon the trustees' approval. But it is admitted in the pleadings and in the evidence that Paterson was the beneficial owner and that the trustees were in fact and substance merely mortgagees, who could be called upon to implement the contract made by the beneficial owner. So that there is nothing here on which to base a difference of opinion from that of the trial Judge.

Objection was also taken to the description of the lands as being inadequate. But the decisions on this branch of the Statute of Frauds have been of the most liberal character. I think the evidence before us, and that tendered to amplify it, sufficient. In fact this objection, as I understand it, was not seriously insisted upon.

In my opinion, the judgment appealed from should be affirmed.

HOWELL, C.J.M., and RICHARDS, J.A., concurred.

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IN THE COURT OF APPEAL.

TOD v. MAGER.

RE ST. VITAL MUNICIPAL ELECTION.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Quo warranto—Municipal election—Proceeding to unseat candidate declared elected—Municipal Act, R.S.M., 1902, *c.* 116, *ss.* 217, 218.

The applicant and the respondent were both duly nominated as candidates for election as reeve of the municipality, when an objection that the applicant was a paid officer of the municipality, and therefore disqualified, was, contrary to the law as laid down in *Pritchard* v. *Mayor of Bangor*, (1888) 13 A.C. 241, given effect to by the returning officer and the respondent declared duly elected without any poll being taken.

Section 218 of the Municipal Act provides that a municipal election shall not be questioned on any of the grounds mentioned in section 217 except by an election petition under the Act.

Held, CAMERON, J. A. dissenting, that the applicant's complaint could not be said to be on the ground that the respondent "was not duly elected by a majority of lawful votes," and that, as none of the other grounds mentioned in section 217 could be taken, the applicant could not proceed by an election petition and should have leave to file an information in the nature of *quo warranto*.

The King v. *Beer*, [1903] 2 K.B. 693, followed.

The Queen v. *Morton*, [1892] 1 Q.B. 39, and *Harford* v. *Linskey*, [1899] 1 Q.B. 852, distinguished.

DECIDED: 29th April, 1912.

Statement. APPLICATION for leave to file an information in the nature of *quo warranto* calling upon the respondent Mager to show by what authority he held office as Reeve of the Rural Municipality of St. Vital.

From the material adduced it appeared that the applicant was a qualified elector of the municipality.

Applicant and respondent were candidates for election as reeve of the municipality for the year 1912. They were both duly nominated on the 5th day of December, 1911. The voting would have taken place on the 19th day of that month.

After the nomination objection was taken before the returning officer that applicant, being a noxious weed

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inspector of the municipality, was a paid officer and disqualified under section 53 of the Municipal Act, R.S.M. 1902, c. 116. The returning officer gave effect to this objection, and put an end to the contest by declaring respondent elected.

The application was granted by Robson, J., who directed an order to go as asked.

Mager appealed.

H. Phillipps for appellant, Mager, cited *Queen* v. *Morton,* [1892] 1 Q.B. 39; *Harford* v. *Linskey,* [1899] 1 Q.B. 852; *Queen* v. *Miles,* 64 L.J.Q.B. 420; *South Renfrew Election* No. 2, Hodges' Elec. Cas. 705; *Pritchard* v. *Mayor etc., of Bangor,* 13 A.C. 257, and *The King* v. *Beer,* [1903] 2 K.B. 693.

H. M. Hannesson for respondent, Tod, cited *Halsbury's Laws of England,* vol. 12, p. 189, and *Queen* v. *Cooban,* 56 L.J.M.C. 33.

HOWELL, C.J.M. Section 71 of the Municipal Act, R.S.M. 1902, c. 116, provides that the electors shall annually on the third Tuesday in December elect the members of the Council "except such members as have been elected at the nomination." Section 84 requires that "A meeting of electors shall be held in each year for the nomination of candidates." Section 86 declares that "The clerk of the municipality shall be the returning officer to preside at such meeting." By section 87, "The time for receiving nominations shall be between the hours of twelve o'clock noon and one o'clock in the afternoon," and by section 88 it is provided that, "if only one candidate for the office of mayor or reeve have been nominated within the time limited, the returning officer or chairman shall declare such candidate duly elected." Section 89 provides that if more candidates are nominated "the returning officer or chairman shall announce the same and make known to the electors present the

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time and place" when and where the polls will be opened; and, by s-s. (*a*) of that section, it is provided that, if more candidates than the required number are nominated, "any one of them may, before two o'clock on the day following the nomination day, tender his resignation which will be accepted by the returning officer when a sufficient number of them remain for election."

It seems, then, that the statute requires a meeting of electors over which there shall be a presiding officer and that, at the meeting and between noon and one o'clock, the nomination shall take place, that if there is but one person nominated the presiding officer shall declare him elected and this person is by section 71 called a person "elected at the nomination," and the presiding officer at the meeting shall—if there are more than one candidate—"announce the same and make known to the electors present" as to the time and place of voting. Plainly this shall all take place at the meeting of electors, or in other words at the nomination meeting.

Sub-section (*a*) of section 89 makes one exception to this and allows the returning officer apparently to act otherwise in the single case where within 25 hours a rival candidate tenders his resignation to that officer.

In this case there were two candidates nominated and the returning officer duly made the announcements required by section 89. The next day, and of course after the meeting was over, that officer, believing that one of the candidates was disqualified, declared the other one, the defendant, duly elected and the latter has taken the office and is acting as if elected.

The action of the returning officer was clearly illegal: *Pritchard* v. *Mayor etc., of Bangor*, 13 A.C. 241. He had no power whatever to decide this question and no power to arrest the election proceedings commenced by him.

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HOWELL, C.J.M.

The defendant was not elected either at the nomination or at the polls.

If the returning officer had at the nomination treated the defendant as the only candidate and had declared him elected, then he would have been elected at the nomination, and although the action of the returning officer would have been illegal the remedy would be by petition under section 217 and following sections: *Harford* v. *Linskey*, [1899] 1 Q.B. 852. It seems clear that, if there is a remedy by petition, then there is no remedy by *quo warranto*: *Queen* v. *Morton*, [1892] 1 Q.B. 39; *The King* v. *Beer*, [1903] 2 K.B. 693.

It is not pretended that the defendant was elected at the nomination nor was there an election at the polls. It is not a case of the defendant having been unlawfully elected at the nomination for, as above mentioned, the returning officer took the opposite position at the nomination and gave notice of the polls.

If there is jurisdiction for a petition it arises under s-s. (*c*), "That he was not duly elected by a majority of lawful votes." To again repeat: he was not elected by the voters—even if unlawfully—at the electors' meeting for nomination and there was no other election. While the election matters were proceeding and before any election was held he obtruded himself into the office and pretends still to hold it. I think the case of *The King* v. *Beer*, [1903] 2 K.B. 693, is an authority for holding that in this case a writ of *quo warranto* will lie.

The appeal must be dismissed with costs.

RICHARDS, J.A. It seems clear that, where the remedy is by petition, under section 217 of the Municipal Act, there is no remedy by *quo warranto*; and the question simply is whether, in this case, the remedy sought could have been had under that section. The section reads: "A municipal election may be questioned by an election petition on the ground": Then follow three grounds.

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The first two need not be considered. The third is "(*c*) That he was not duly elected by a majority of lawful votes."

The learned Judge, whose decision is appealed from, held that, in this case, the remedy by petition would not lie, because a poll was not had and, therefore, in his opinion, there was not an election by a majority of lawful votes, as defined in s-s. (*c*).

It will be noticed, from the wording of the main part of the section, that a petition only lies where there has been an "election," at least of some kind. The returning officer does not elect the candidate. That is done by the methods provided by the Act. There are apparently three ways in which a candidate may become elected to the office of reeve:

1st.—By being the only person nominated at the meeting held for nomination;

2nd.—By the withdrawal before two o'clock, on the day following the nomination, of his opponent, or opponents, leaving him the only person nominated;

3rd.—By obtaining a majority of votes at the poll.

The Act provides that, on any one of these three things happening, the candidate is to be declared elected. The declaration does not elect the party that it declares elected. It is only a formal method of showing that the party named has been elected under the provisions of the Act. It has no effect in any other way. The returning officer, in making it, is a ministerial officer only.

Now, in this case, there were two candidates duly nominated, so that the first condition is not complied with. Mager's opponent did not withdraw, so that the second one has not been complied with. There was not a poll held, and therefore Mager was not elected by a majority of the votes, so that the third situation did not arise.

The case of *Harford* v. *Linskey*, [1899] 1 Q.B. 852, is

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RICHARDS, J.A.

distinct authority that the returning officer had no power whatever to go behind the face of the apparently regular nomination papers of Mager's opponent and to declare that such opponent was not qualified. Even if he had that power, there is no provision saying that he might then declare Mager elected. His so-called declaration, made at the time it was, was of no more effect than would be that of any other person who chose to make such a declaration.

When, at the end of the hour for receiving nominations, he announced that there were more candidates nominated than were required to fill the office of reeve, and made known to the electors present the time and places when and where the polls would be opened for the taking of votes for the candidates nominated, he became *functus officio,* so far as his duties at the meeting were concerned. He had no power thereafter to recall what he had done. On the contrary, it was his duty to go on and have the polls held, Mager's opponent not having withdrawn by two o'clock on the following day. This seems to me, from the wording of the Act, to be so plain as to require no authority to be cited in support; but, if one be required, it was so held in *The Queen* v. *Miles,* 64, L.J.Q.B. 420. As the returning officer did not go on and hold the poll, no person was "elected" to the office of reeve, and the returning officer's declaration to the contrary was a nullity.

It is argued that there was an election, though an irregular one. I cannot bring myself to accept this view. As stated above, it seems to me that the action of the returning officer in deciding, as he did (and without any pretence of statutory authority for so doing), to reject Tod's nomination paper and to declare Mager elected, no more constituted an election than the same action by any other person than the returning officer would have.

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It was argued that, because by-laws, bonds and other acts, which would be valid if signed or done by a duly elected reeve, are equally valid if signed or done by a *de facto* reeve, we should hold that, when Mager was declared elected and took the oath of office and acted as *de facto* reeve, there had of necessity been some kind of an election. I am unable to agree with that contention. The validity given to such documents and acts does not depend upon any question of election or of the right of the party acting as reeve to so act. It is given, as I understand the law, because of the necessity to protect those who have taken some step (*e.g.* the purchasing of a bond so signed) in reliance upon the acts of the person who has in fact entered into the office of, and purported to act as, reeve.

The credit and borrowing powers of a municipality would be most seriously hampered if, every time that one of its bonds changed hands, the purchaser had for his own safety to satisfy himself of the validity of the election of the reeve who had signed it, or of the due appointment to office of the clerk or treasurer who also signed.

There having been, in my opinion, no election whatever, I think an election petition would not lie under section 217, because that section only refers to questioning an "election."

There is much to be said for the construction put by the learned Judge appealed from upon the wording of s-s. (*c*), as limiting section 217. But, in the view I take, it is unnecessary to express an opinion here as to that.

I would dismiss the appeal with costs.

PERDUE, J.A. The returning officer clearly acted beyond the scope of his authority in assuming to deal judicially with the question of Tod's alleged disqualification, after he, the returning officer, had received Tod's nomination paper and had made known to the electors

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PERDUE, J.A.

where and when the poll would be held. It was not until the afternoon following the nomination that the returning officer pretended to reject Tod's nomination. *Pritchard* v. *Mayor of Bangor,* 13 A.C. 241, is a clear authority against the power of the returning officer to do what he has pretended to do.

The real question to be dealt with upon this appeal is, whether a proceeding in the nature of *quo warranto* is open to the applicant, or does section 217 of the Municipal Act compel him to proceed by election petition only?

Section 217 declares that a municipal election may be questioned by an election petition on the ground,— (*a*) that the election was voided by corrupt practices or offences; (*b*) that the person whose election is questioned was disqualified at the time of the election; (*c*) that the person whose election is questioned "was not duly elected by a majority of lawful votes." By section 218, a municipal election shall not be questioned on any of the above grounds, except by an election petition. It is clear that, if the present is a case in which relief could be given by an election petition, the remedy by way of *quo warranto* is excluded. The latter was the proper common law proceeding where there had been a usurpation of any office of a public and substantive nature: per Tindal, C.J., in *Darley* v. *The Queen,* 12 Cl. & F. 541. This remedy is still the proper one to take for the purpose of ousting a *de facto* occupant, where he is not in possession *de jure,* if some other statutory remedy has not been provided excluding proceedings by way of *quo warranto*: *The King* v. *Beer,* [1903] 2 K.B. 693; *Regina ex rel White* v. *Roach,* 18 U.C.R. 226.

For the appellant in this case it is contended that there was in fact an election by the action of the returning officer in rejecting Tod's nomination paper and declaring the appellant duly elected. If the course taken by the

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returning officer had been taken at the meeting of the electors called for the purpose of nominating candidates, there would have been, I think, considerable force in this contention. If one of two nomination papers did not comply with the law and for that reason, or for any reason that was considered sufficient, was rejected by the returning officer and the remaining candidate was then and there declared by the same officer to have been elected, as unopposed, this might, I think, be regarded as an election coming within the meaning of sub-section (*c*) of section 217 of the Municipal Act. By the provisions of the Act the electors are called to a meeting for the nomination of candidates (section 84). If only one candidate has been nominated for the office the returning officer shall declare such candidate duly elected (section 88). The nomination is an essential part of the election and may, with the returning officer's declaration, constitute the election itself where only one candidate is before the meeting. But, if, as in the present case, two nomination papers have been received, the returning officer shall announce to the electors present the time and places where polls will be opened for the taking of votes (section 89). The returning officer received Tod's nomination paper, raised no question as to the candidate's qualification or the validity of the nomination and announced when and where polls would be held. I think that he had then performed his functions in regard to the nomination of candidates and that, in so far as the election now in question was concerned, he could only proceed with the taking of a vote.

The case of *Harford* v. *Linskey,* [1899] 1 Q.B. 852, does not afford any assistance to the appellant. In that case nomination papers had been filed on behalf of two candidates. The mayor, in accordance with the provisions of the English Act, attended at the town hall for the purpose of deciding on the validity of objections

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made in writing to the nomination papers; Municipal Corporation Act, 1882, (Imp.) c. 50, 3d Schedule, part II, sec. 9. He allowed an objection taken to the qualification of one of the candidates and disallowed the nomination paper, with the result that the other candidate was in due course declared elected by the returning officer as the sole candidate nominated. It was held on petition filed, following *Pritchard* v. *Mayor of Bangor*, above cited, that the Mayor had no power to entertain an objection of disqualification. Although it was conceded in *Harford* v. *Linskey* that petition was the proper procedure, I think the case is quite distinguishable from the present one. In *Harford* v. *Linskey* the mayor was empowered to decide on the validity of every written objection to a nomination paper. The returning officer was bound to follow the mayor's decision and, if one of the two nomination papers was rejected, to declare the candidate named in the other elected as upon an uncontested nomination. Further, the English Act provides that the decision of the Mayor, which is to be given in writing, shall, if allowing an objection, "be subject to reversal on petition questioning the election or return"; third schedule, part II, sec. 14.

In the present case the meeting of electors for the nomination of candidates was past and done with and provision had been made for taking the votes of the electors, before the returning officer rejected Tod's nomination paper. The power of the returning officer over the nomination papers was at an end when he attempted to disallow one of them. His action in declaring Mager elected was wholly unauthorized. It was not an election, as it took place after the time had passed for declaring one candidate elected in the right of an uncontested nomination.

I think that proceeding by way of *quo warranto* was

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proper in this case and that the appeal should be dismissed.

CAMERON, J.A. In my judgment the words "by a majority of lawful votes" in sub-section (*c*) of section 217 of the Municipal Act, do not restrict the meaning of the words "duly elected," and in this I must differ from Mr. Justice Robson who made the order appealed from. The whole policy of the Act in respect of its election provisions is to secure the election of municipal representatives in accordance with the wish of a majority of the voters. The expression of this wish may be ascertained, under the provisions of the statute, either through the medium of ballot papers deposited in the boxes at the polls or at the nomination proceedings where, if only one candidate for the office of reeve be nominated within the time limited, the returning officer shall declare such candidate duly elected. Thus the words "by a majority of lawful votes" are merely explanatory and are in no way restrictive of the words "duly elected," and in my opinion a petition lies under sub-section (*c*) of section 217, even if the election takes place without an actual poll or casting of the ballots.

As I understand it, however, the decision of this Court in dismissing this appeal is not based on the above ground, but on the ground that there was here no election and therefore section 217 is wholly inapplicable. That is to say, the election, or so-called election here in question, was a nullity. With deference I must dissent from that view. The date of the nomination was fixed by statute. The proceedings were regular up to and inclusive of the nomination proceedings and as to the proceedings required by section 89. Both Mager and Tod were duly nominated. That the returning officer acted without authority in over-ruling Tod's nomination is admitted. But can it be said that his declaration of Mager's election was absolutely without effect? The statute in

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no way limits the time within which after one candidate only has been nominated the returning officer shall declare him elected. That need not be immediately after the lapse of the hour, but may be the next day or on the second or third or fourth day thereafter, so far as I can see. Had Tod's nomination paper been a plain sham, something on which the returning officer could not act, a delayed declaration would not have affected Mager's election, in my judgment.

The County Court Judge, to whom the petition under section 217 is presented, is, at the trial, to determine whether the person whose "election" is complained of was "duly elected" or whether "the election was void" (sec. 236). This clearly contemplates an election voidable on certain grounds being declared void at the hearing. For this Court now to declare this election void is, in my opinion, for it to undertake a function expressly assigned by the Act to the trial Judge.

Had no proceedings been taken to quash this election it would stand as good and valid in every respect. By-laws, debentures and other documents to which the signature of the reeve was necessary, and proceedings of the Council at which his presence was essential, would have been valid and absolutely unquestionable. How then can it be said there was no election whatever?

The meaning given to the word "election" in the Act varies. In the quotation from section 236 given above it means the official signification of the candidate who appears to have the majority of votes or to have been the only person nominated. This is the sense in which it seems to me to be used in the first line of section 217. But by the interpretation clause "election" includes nomination, (section 2). In section 71 we find a provision referring to members of the Council who are "elected at the nomination." And by section 88, if only one candidate be nominated, the returning officer shall

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declare such candidate "duly elected" without a poll. In section 276 the word "election" refers to the whole period covering the events relating to the nomination and the polling, which period commences before the nomination. Elsewhere in the Act the word "election" means the actual polling and proceedings on the day when the ballots are cast, as it seems to me is the case in section 82. The meaning which I would assign to it in the first line of section 217 would be that which it conveys in section 236, as I have set it out above.

Let us suppose a prosecution for a penalty under section 276 or 277 in a case similar to this where the offence was committed prior to the time when the returning officer made his unauthorized declaration. The fact of the declaration and the bringing of the election proceedings to an end in that way would not make the offence any the less an offence at an election and under the election provisions of the Act. How then can it be said that there was here no election?

Let me call attention to the use of the term "no completed election" by Lord Watson in *Pritchard* v. *Bangor,* 13 A.C. 252. "If," he said in that case, "there was no declaration, then there was no completed election of either of these two candidates." During the whole period of the events in question herein it could be said that there was an election pending, until at any rate the returning officer made his declaration which had in fact no validity, and was as if it had never been made. But the election, once pending, once in process of completion, was never completed. There was, in fact and in law, no completed election; but there was an election nevertheless, though not carried to a finality as contemplated by the Act.

My conclusion, therefore, with all deference, is that there was here an actual, a *de facto* election, an election in fact acted upon, inasmuch as Mager took the oath of

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CAMERON, J.A.

office and qualified under the Act and exercised the powers of reeve. It is quite true that the returning officer, in his rejection of Tod's nomination, acted illegally and in a manner wholly unauthorized by the statute, so that Mager's election must necessarily be voided when once questioned on that ground. But up to the time of that rejection his proceedings were quite regular and in accordance with the Act, so that Mager's election was not a nullity, but voidable only if attacked and not otherwise. And, if so attacked, power is given to the County Court Judge to declare the election void on a petition presented to him under the statute, as I have pointed out. This statutory proceeding was obviously intended to put an end to the difficulties which have frequently arisen as to the proper procedure in cases of this kind, "and to create a simple method of procedure which would, shortly after the election, settle the question in dispute." per Lord Herschell in *Pritchard* v. *Bangor, supra,* at p. 260. There was, in point of fact, however, a municipal election here which it is now sought to set aside after the time fixed by the Act has expired.

The facts in the case of *Harford* v. *Linskey,* [1899] 1 Q.B. 852, are somewhat similar to those here. There there were two candidates duly nominated, by nomination papers properly delivered on October 25. After Harford's nomination paper was put in, Linskey objected to it and the Mayor, on October 25, allowed the objection. Subsequently, on November 1 when the election was held, Linskey was declared elected as being the only person validly nominated. Harford then presented his petition under the sections of the Municipal Corporations Act, 1882, similar to our sections 217 and 219. There as here, it was conceded, on the authority of *Pritchard* v. *Bangor,* that the Mayor had no jurisdiction to entertain the objection to the petitioner's nomination. There, as here, both candidates were validly nominated and would

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CAMERON, J.A.

have gone to the polls in regular course, but for the arbitrary and illegal action of a statutory officer. There, as here, if the argument of the majority of this Court be correct, there was no election, the pretended election was a nullity, and therefore, there having been no municipal election to be called in question, a petition did not lie. But the eminent counsel for the respondent did not apparently even suggest the objection. On this point I cannot see any material difference between the two cases.

There was, as I believe, an election here, a *de facto* election, an election acted upon, and it is sought to impeach it in this proceeding in a manner other than that prescribed by statute. I can see it in no other light, and I would allow the appeal.

Appeal dismissed.

RE PHILLIPPS & WHITLA (No. 1).

Before ROBSON, J.

Solicitor and client—Taxation of costs—Appeal from certificate of taxing officer—Bringing in objections—King's Bench Act, Rules 682, 684, 965 *and* 967—969.

Rule 682 of the King's Bench Act should be read along with paragraph (*d*) of Rule 965, and is the Rule to be applied in case of an appeal from the certificate of the taxation of costs between solicitor and client and not Rule 684.

The carrying in of written objections to items of the bill before the taxing officer as provided for in Rule 968 and the officer's reviewing the items so objected to under Rule 969, are necessary preliminaries to an appeal against the taxation of such items; but, where a question of principle is involved, written objections and review thereon are not necessary prior to appeal.

Re Robinson, (1896) 17 P. R. 137, and *Re Mowat*, (1896) 17 P. R. 180, referred to.

DECIDED: 14th February, 1912.

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Statement.

THE solicitors rendered to their client John McGibbon a bill of costs of certain litigation and the settlement resulting therefrom. The client obtained a præcipe order for taxation under Rule 967. The taxation proceeded and resulted in the allowance of a large sum to the solicitors. A formal certificate was signed by the taxing master. The client became dissatisfied and sought to appeal. No objections were carried in before the taxing officer, and there was, therefore, no review of the taxation under Rules 968 and 969.

The solicitors raised the preliminary objection to the appeal that, owing to the omission to observe these rules, there could be no appeal.

G. W. Jameson for the client.

A. B. Hudson for the solicitors.

ROBSON, J. By clause (*d*) of Rule 965 it is declared that: The amount certified to be due shall forthwith after confirmation of the certificate by filing, as in the case of a master's report, be paid by the party liable to pay such amount.

Our rules in this connection were modelled after the Ontario rules of 1887. In *Re Robinson,* 17 P.R. 137, the question was discussed in the Ontario Court of Appeal. Burton and Maclennan, JJ.A., thought the carrying in of objections and review thereon prior to certificate a pre-requisite to the appeal. Osler, J.A., thought otherwise. Haggarty, C.J.O., reached the same result as Osler, J.A., but on different ground. There was thus no decision. The previous practice had been to treat such a matter as a reference, as it in fact is, and to apply the rules for an appeal from a master's report, and this practice was adhered to notwithstanding anything said in *Re Robinson.* See *Re Mowat,* 17 P.R. 180. The Ontario rules were subsequently amended so as to establish this latter practice. (See Rule 773). Applying the Ontario cases prior to this amendment the

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present objection would have to be disregarded. The subject was important there in an additional feature, *i.e.* as to the *forum* for the appeal, appeals from taxations ordinarily going to chambers while appeals from master's reports went to a Court. Here all such appeals are taken to a Judge in chambers. Before applying the practice in Ontario under the rules as they existed at the time of the cases above mentioned, and which resembled our present rules, it is necessary to look below the mere surface.

From in *Re Robinson* and earlier cases it appears that, in the Court of Chancery a master's certificate of taxation between attorney and client was treated as a report and appealable as such, there being no such practice as review upon objections before certificate. Under the rules of the Judicature Act, 1881, the taxation of a solicitor and client bill was reviewed in the same way as the taxation of a bill between party and party. In 1887 clause (*d*), being in the same language as clause (*d*) of our rule 965, was introduced. See per Osler, J.A., 17 P.R. 147-148. That learned Judge held (149) that the effect of this was to withdraw a report or certificate on a solicitor and client taxation from the operation of the rule as to other taxations and to revert to the earlier practice. A perusal of the Ontario cases shows that that intention was carried out in practice there. With us the situation is different as clause (*d*) was in the original of Rule 965, and Rules 968 and 969 were enacted contemporaneously with it. (See Q. B. Act 1895, Rules 958, 961, 962.) In short, clause (*d*) was not inserted with the intention of changing a practice.

The general language of Rules 968 and 969 is wide enough to apply to the reference of a solicitor's bill for taxation. The carrying in of objections and review prior to certificate may be had on the reference of a solicitor's bill quite as readily as in the case of a party

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and party taxation. Clause (*d*) still has its effect, which is that the appeal is to be treated as from a master's report, and is to be taken in the method and within the time mentioned in our Rule 682 rather than in those prescribed in Rules 684 and 685. I would hold that Rules 968 and 969 of the King's Bench rules apply to solicitor and client taxations, but that the appeal from the certificate is under Rule 682 instead of under Rule 684. Except as to time this may make little practical difference. Osler, J.A., in *Re Robinson* thought the different method of appeal in solicitor and client cases was instituted advisedly. Maclennan, J.A., thought this was an anomaly. As was said by Mr. Justice Osler (p. 149 of the report), the questions which arise in the case of solicitor and client references are frequently of a larger and more important nature than in the case of party and party taxations.

The similar rules have, both in England and Ontario, been held not to apply where the principle of taxation was involved, but merely upon a taxation of items only. See *Sparrow* v. *Hill*, 7 Q.B.D.362; *Re Fletcher & Dyson*, [1903] 2 Ch. 688; *Re Robinson, supra*, 148; *Clark* v. *Virgo*, 17 P.R. 260. In the present case the bill consists of one large item for solicitor's work and a number of small items of disbursements. It is said that the solicitors forewent the items usually found in a solicitor's bill for litigious work and sought a lump fee, termed Fee on Settlement. The amount allowed was based on a percentage of the value said to have been recovered or preserved for the client. It seems to me that there is a double question of principle involved here, *viz*:—whether the remuneration of a solicitor on a percentage basis for the work of litigation is authorised, and whether the measure applied in this instance was a proper one. I, of course, express no opinion on these questions, but it is clear to me that they arise and

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ROBSON, J.

I must hold that questions of principle were involved in this reference.

I must decline to give effect to the preliminary objection.

RE PHILLIPS & WHITLA. (No. 2)

Before ROBSON, J.

Solicitor and client—Costs—Taxation—Fee based on percentage of amount recovered by litigation—Allowance for proceedings out of Court to save costs or compromise actions.

Unless there is a contract between a solicitor and his client for a percentage or other mode of remuneration under section 65 of the Law Society Act, R.S.M., 1902, c. 95, the tariff of costs promulgated under Rule 990 of the King's Bench Act provides the only measure of a solicitor's remuneration for litigious business, and it is a wrong principle for the taxing officer to award the solicitor, in lieu of fees as provided for by the tariff, a single fee based on a percentage of the amount recovered or preserved for his client by means of an action in the Court, although the solicitor, by his successful efforts to procure a settlement, has secured to his client a considerable advantage.

A fee so based is not warranted under the provision in the tariff that an allowance may be made by the taxing officer in his discretion when "proceedings have been taken by solicitors out of Court to expedite proceedings, save costs or compromise actions."

Appeal from certificate of taxation allowed and bill referred back with liberty to the solicitors to deliver an amended bill with items according to the tariff, and a direction that the taxing officer allow a fee in respect of the settlement of the litigation under the clause in the tariff above quoted.

In re Richardson, (1870) 3 Ch. Ch. 144; *In re Attorneys*, (1876) 26 U.C.C.P. 495, and *Re Johnston*, (1901) 3 O.L.R. 1, distinguished.

DECIDED: 5th March, 1912.

Statement.

APPEAL from the report or certificate of a taxing officer upon a reference to him of a solicitor's bill for taxation.

G. W. Jameson for the client cited *Howard* v. *Burrows*, 7 M.R. 181; *Wilkinson* v. *Smart*, 33 L.T. 573; *Blake* v. *Hummell*, 51 L.T. 431, and *Re Mowat*, 17 P.R. 180.

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Argument.

A. B. Hudson for the solicitors cited *Cyc.* vol. 4, p. 994; *Re Attorneys,* 26 U.C.C.P. 495; *Re Johnston,* 3 O.L.R. 1; *Re Richardson,* 3 Ch. Ch. 144; *Burton* v. *Burton,* 29 L. J. Ex. 291; *Pobjoy* v. *Rich,* 27 L. J. Ex. 10; *Sollery* v. *Flewker,* 27 L.J. Ex. 11; *Re Congreve,* 4 Beav. 87; *Re Moss,* 3 W.R. 19, and *Re Mortimer,* 18 W.R. 367.

ROBSON, J. One McGibbon set up a cause of action against parties in Winnipeg for the return of certain property alleged to have been sold by his agents under circumstances which he alleged entitled him to repudiate the transaction. He employed the solicitors, who instituted proceedings; negotiations followed, and as a result the property was re-transferred. McGibbon gained the advantage of a title under the Real Property Act obtained meanwhile. He had had the use of the consideration paid him, a large sum, for a considerable period free of charge. The commission charged by the agents was refunded. Each party paid his own costs of the litigation. The property could command a higher price than that obtained by the agents. The sale was made at $155,000. As to the increase in market price, it is sufficient to say that the client, during the negotiations, claimed that the property was worth $308,000. There can be no question that the solicitors exercised skill and diligence, in fact pertinacity, in their employment and that their efforts brought about advantageous results for their client. The action did not proceed beyond the pleadings and an order for production of documents. The burden of the solicitors' labors was in connection with the settlement. The carrying out the settlement included work in connection with a large loan to the client, which was necessary to procure the money to refund the consideration he had received on the impeached transaction. There was no arrangement between the solicitors and client for any special rate of remuneration.

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RONSON, J.

The solicitors rendered the bill now in question. Apart from disbursements, which are not in question, it consists of one single item, "Fee on settlement, $9,500.00." The taxing officer considered that the case was one in which he should allow a lump sum, and he fixed $7,976.44, being 5 per cent. on his calculation of the difference between the $155,000 and the value asserted by the client, some fractional frontage probably accounting for the odd figure.

The taxing officer in proceeding on a commission basis thought *In re Richardson,* 3 Ch. Ch. 144, an authority for that course. There the solicitor was acting under a power of attorney in selling lands for the client and collecting and remitting moneys; an employment of quite a different nature, the method of remuneration for which forms no criterion here.

I take it to be clear that, unless there is a contract between a solicitor and his client for a percentage under section 65 of the Law Society Act, R.S.M., 1902, c. 95, the tariff promulgated under the Queen's Bench Act, Rule 986 (K. B. Act, Rule 990) provides the only measure of a solicitor's remuneration for litigious business.

In his memorandum the taxing officer says the solicitors forego their fees for work done in the suit and charge only for the settlement. From the evidence (pages 7-8) I would think it had been intended that the suit work was being covered by the bulk item charged. If that were the case there should have been an itemized bill.

Assuming, however, that the item was allowed solely in regard to the settlement and that the usual tariff items for instructions, pleadings, etc., are being abandoned, the question arises, was the taxing officer correct in arriving at a fee on settlement on the basis mentioned? As far as the tariff goes the only possible authority for

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this would be the Memorandum on page 10, which says:

"1. When it is proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance to be made therefor in the discretion of the taxing officer."

Of course, if the taxing officer on a right principle exercised his discretion under the words quoted, it would not be lightly interfered with, if at all. But what was the principle here? That a solicitor should receive remuneration "in the way of commission or percentage on the amount recovered or defended or on the value of the property about which (the) action, suit or transaction is concerned." This language is from section 65 of the Law Society Act. And that section provides that there may be a contract for such a basis of remuneration. Is not that provision an enabling one without which such a basis could not be adopted, and therefore limited to the case for which it provides, *i.e.*, a contract between the parties to that effect? Section 65 is of course valid, (*Thomson* v. *Wishart*, 19 M.R. 340) but it is an innovation upon the Common Law, and is not to be carried beyond its strict terms. If the result be otherwise, solicitors, in charging clients, may ignore the tariff and seek remuneration by commission or percentage without any previous agreement with their client to that effect.

I cannot hold that the taxing officer was justified in fixing a fee on settlement under the tariff on any basis that would have that result.

It is further contended that the solicitors' efforts in procuring the settlement should be treated independently of the tariff and as work not therein provided for.

I do not agree with this. I think the proper course here is that the solicitors deliver an itemized bill and that the taxing master allow a fee in respect of the settlement under the clause quoted from the tariff.

Counsel for the solicitors cited in support of his con-

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tention authorities for the allowance in certain circumstances of remuneration by way of commission.

One of these cases was *In re Attorneys,* 26 U.C.C.P. 495, where the attorneys had been engaged in non-contentious business which involved their receiving and disbursing from time to time large sums of money. They were allowed for their care and responsibility a commission of one-eighth of one per cent. This case was referred to in *Re Johnston,* 3 O.L.R. 1. There the solicitor had succeeded in collecting upwards of $70,000 for his client on disputed insurance policies, and had satisfactorily settled the claim of a third party to the moneys. The Court held he was entitled to reward *quantum meruit* for these services, and the $3,200 which had been allowed by the taxing officer was not interfered with. It does not appear that this was a percentage allowance. Boyd, C., held that, having regard to the exceptional circumstances, a liberal allowance was justified. He mentioned the line of practice which followed *In re Richardson, supra,* as manifested in *In re Attorneys, supra.* It seems to me that, while in certain cases a percentage measure, varying according to circumstances, may fairly be applied to the sale of property or the receiving and investing or otherwise disbursing moneys, as was done in those cases, it does not follow that solicitors' efforts in litigation should be rewarded upon any such rule.

While it is apparent that the solicitors are entitled to substantial remuneration, I do not consider that the measure applied was authorized, and the bill must be referred back. The solicitors will have liberty to deliver an amended itemized bill. The taxing officer will allow to the client his costs of this appeal.

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WOLFSON v. OLDFIELD. (No. 1.)

1911

Before ROBSON, J.

Fraud—Principal and agent—Real Property Act, R. S. M. 1902, *c.* 148, *ss.* 71 *and* 76.

1. It is a fraud sufficient to vitiate the sale for a real estate agent to lead the owner of land to confide in him as his agent to get the best possible price for the property and to allow him to close a bargain on his behalf when, as a matter of fact, he, the agent, was at the same time acting as agent for the purchaser in an endeavour to get the property at as low a price as possible without disclosing that fact to the owner.
2. The purchaser cannot under such circumstances, although ignorant of the fraud, be allowed to retain the benefit of the transaction procured by his agent.

Pearson v. *Dublin Corporation*, [1907] A. C. 351, followed.

3. Such conduct on the part of an agent is *fraud* within the meaning of that word as used in sections 71 and 76 of The Real Property Act R. S. M. 1902, c. 148, and therefore the procuring by the purchaser of a certificate of title under that Act for the property would not prevent the vendor from having the sale set aside and the property ordered to be reconveyed to him upon payment of moneys received.

DECIDED: 27th June, 1911.

Statement.

IN this action the plaintiff sought to set aside a sale made by him of certain property on Carlton Street, Winnipeg.

H. Phillipps and *H. W. Whitla* for plaintiffs cited 31 *Cyc.* 1447; *Bowstead on Agency*, 356, and *Assets Company* v. *Mere Roihi*, 74 L.J.P.C. 49; [1905] A.C. 176.

R. M. Dennistoun, K.C., and *C. H. Locke* for Oldfield, Kirby & Gardner cited *Salomons* v. *Pender*, 3 H. & C. 637; *Hippisley* v. *Knee Bros.*, [1905] 1 K.B. 1, and *McPherson* v. *Watt*, 3 A.C. 254.

A. E. Hoskin, K.C., and *P. J. Montague* for Meredith and Real Estate Investment Company cited *Assets Company* v. *Mere Roihi*, 74 L.J.P.C. 49; *Syndicat du Klondyke* v. *McGrade*, 36 S.C.R. 251; *Shaw* v. *Bailey*, 17 M.R. 97; *Halsbury*, vol. 1, 147-8; *Hesse* v. *Briant*, 6 De G. M. & G. 623; *Farrar* v. *Farrars*, 40 Ch. D.

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395; *Rolland* v. *Hart*, L.R. 6 Ch. 678; *Gunn* v. *Vinegratsky*, 20 M.R. 311, and *Re David Payne Company*. [1904] 2 Ch. 608.

ROBSON, J. At the time of the matters in question, the defendants, Messrs. Oldfield, Kirby & Gardner, Real Estate Agents and Brokers of Winnipeg, were agents for plaintiff in looking after tenancies, etc., in respect of several properties in Winnipeg, including that in question. In August, 1910, the plaintiff gave a list of certain lands to Oldfield & Co. with prices indicated thereon. The list was headed: "List of properties owned by Leon Wolfson, *for sale*, subject to change of prices or withdrawal without notice." The price named in respect of the property in question was $28,000.

Matters stood at this between these parties until 20th January, 1911, when Oldfield & Co. opened a cable correspondence with plaintiff in England, they using the name of "Oldgard." It will be convenient to set out that correspondence in full as translated from the code. It is as follows:

"Winnipeg, Jan. 20, 1911.

"Wolfson, Liverpool.

Offered $27,500 Carlton Street. Best offer we could get, $7,500 cash, assume mortgage, balance three annuals, interest six, reply. Oldgard."

"Jan. 23, 1910

"Oldgard, Winnipeg.

Hesitate about selling Carlton property, central position, heart City, think $28,750 little enough. Would you advise me to sell at this price? Please cable advice. Wolfson."

"Winnipeg, Jan. 23rd, 1911.

"Wolfson, Liverpool.

Can close at your price, $28,000. Must have immediate reply. We proposed purchase. Oldgard."

"Jan. 24, 1911.

"Oldgard, Winnipeg.

Don't feel disposed to sell under $28,750. Wolfson."

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"Winnipeg, Jan. 25, 1911.

"Wolfson, Liverpool.

Must have a definite reply, unless you reply immediately lose the business. Can close at $28,000. Oldgard."

"Jan. 26, 1911.

"Oldgard, Winnipeg.

Up grade, central position, hesitate about selling. However, divide difference sell at $28,375.00 ultimatum. Wolfson."

"Winnipeg, Jan. 27th, 1911.

"Wolfson, Liverpool.

Closed at $28,375, $7,375 cash, balance on terms specified in our telegram, await written instructions from you. Oldgard."

"28 Jan., 1911.

"Oldgard, Winnipeg.

Confirm sale subject existing agreements. Coming out February. Wolfson."

It will be well, before further proceeding with the facts, to consider the position of the plaintiff and these defendants, Oldfield & Co., at this time.

The case depends on the evidence of a fiduciary relation between them then.

It is quite possible that there may be cases where the agency is merely to procure a purchaser at a fixed price, and where considerations as to the personality of the purchaser, or the adequacy of the price, do not enter.

In *Morgan* v. *Elford,* 4 Ch. D., 352, for instance, the bargain between the owner and the broker was that the latter should have whatever the land brought above a certain price. It was held that there was no fiduciary relationship. The test applied was whether the broker was an agent employed to get the best price.

It may well be that if Oldfield & Co. had at once, after the list was handed to them under the circumstances mentioned, found a purchaser willing to buy at the price given them by plaintiff, the personality of the purchaser would

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have been unimportant. It is not necessary to decide this. In any event, the time for that was past. The "Listing" is now merely a matter of introduction. The cablegram of 20th January, 1911, created a new situation. That cablegram told plaintiff plainly that Oldfield & Co. had been trying to find a purchaser for his property, and that the best offer that they could get was $27,500.

This intimated that Oldfield & Co. had found themselves unable to fulfill the special employment, and that they therefore tendered their services to procure the best price available. They abandoned the special employment, if it could be said to be still existing, and desired to assume that of getting the best price.

This message would lead any person, as I find that it did the plaintiff, to believe that Oldfield & Co. were acting on his behalf, doing what they could to get the most for him out of his property. It invited the confidence which plaintiff thereupon reposed in the senders of it.

There was, of course, the implied term that Oldfield & Co. should be paid commission. But even a gratuitous agent entering on the agency is bound to good faith therein, and must exercise such skill as he possesses.

There had, in fact, been no offer to purchase the property at the time this message was sent. But defendant Gardner expected that the defendants, Real Estate Investment Company, might purchase the property. Defendant Gardner was, and had been for some years, manager of that company.

He conferred on the subject of this property with other parties interested in the Company, and the cable negotiations with plaintiff proceeded.

After plaintiff's message of January 26th, 1911, to Oldfield & Co., a meeting of directors of the Real Estate Investment Company was held, and the minutes of that

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meeting contain the following, the Carlton Street property being that now in question:

"*Purchase* re Carlton and Colony Streets:—

The manager reported on these properties for the consideration of the directors. On motion of Mr. Harris, seconded by Mr. W. Wickson, the manager was authorized to complete the purchase of the Carlton Street property, subject to not hearing from the President to the contrary, after inspection of same, before 4 p.m.—Lot 518, Blk. 3, D.G.S. 1 St. John, Plan No. 129, 50 x 120 feet to 20 foot lane. Price $28,375.00, on terms of $7,375.00 cash, assume mortgage of $10,000 at 6½%, said mtge. payable in 1915, with balance of $11,000.00 in three equal instalments, with interest at 6%. Building on property leased until April, 1913, at $135.00 per month."

Defendants Oldfield & Co. then cabled plaintiff the message dated 27th January. On 28th January they received for plaintiff a deposit of $500 on the transaction.

Defendant Gardner frankly acknowledges that in making the purchase he was acting for the Real Estate Investment Company. His firm were also acting for the plaintiff in making the sale. Under the circumstances the duty of Oldfield & Co. was obvious.

It is stated in *Kerr on Fraud and Mistake* at page 173, and amply supported, that there is no rule preventing the same agent from acting for the opposing parties, but he must be able to satisfy the Court that the parties were substantially at arm's length in the transaction, and that there has been the utmost fairness throughout.

The cases in the reports dealing with an agent who has himself purchased his principal's property in the name of another, without disclosure, are analogous. Of these *McPherson* v. *Watt,* 3 A.C. 254, and *Dunne* v. *English,* L.R., 18 Eq., 524, are instances.

The defendant Gardner was so closely identified with the defendant Company that there can be no material distinction between this case and one in which the agent

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has purchased himself, in the name of another, without disclosure.

It is unnecessary to examine the cablegrams in detail. It was known to plaintiff that Oldfield & Co. were well informed on the local situation. They informed him by their first message as to the immediate possibilities of prices for his property. He was not eager to sell. He directed their attention to certain reasonable prospects. They said nothing to him about that phase of the situation, which was very material to him. But the defendant Gardner pointed out those very prospects to the Company, and the Company decided to buy. Can there be any question, under these circumstances, that it was the duty of Oldfield & Co. to inform plaintiff that they were acting for the buyer? Instead of that their communications, in effect, urge his immediate acceptance in language which he might well read to mean that a valuable opportunity was otherwise likely to be lost.

It is apparent to me that Oldfield & Company's object was to get the property for the Company at $27,500, if possible, or as little beyond that as they could lead the plaintiff to accept.

Defendants Oldfield & Co. contend that there was disclosure in that, by the message of 24th January, they say: "We proposed purchase." These defendants put in evidence plaintiff's testimony as to the effect of this expression on his mind.

Plaintiff says he could not understand the expression. It sounded to him as if the defendants Oldfield & Co. proposed buying it, but he saw that that was not in conformity with the previous cables that had been sent.

Considering the position in which the parties stood to each other, the expression might rather have been understood to mean that Oldfield & Co. had, in their endeavors to find a buyer, proposed the purchase to the party who had made the offer.

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Bearing in mind the situation, as then present to the plaintiff, one cannot think that the cablegram in question indicated to him that his supposed agents were, in fact, acting on behalf of the intending purchaser. Even if the words, "We proposed purchase," might have put a person on enquiry, that was not sufficient.

In *Dunne* v. *English,* L.R. 18 Eq., 524, at 535, Jessel, M.R., says: "Now what is the meaning of 'Knowledge which he himself possessed' * * 'Full disclosure of all that he knows.' Is it sufficient to say that he has an interest? Is it sufficient to put a principal on inquiry? Clearly not. Upon that point I have before me the case of *Imperial Mercantile Credit Association* v. *Coleman,* L.R. 6, H.L. 189, 194. There is a passage in the argument of the counsel for the appellants which, I think, very fairly and properly states the law: 'It is not enough to say that the directors were sufficiently informed to be put upon inquiry. They ought, in such a case, to have the fullest information given to them and ought not to be driven to inquiry;' for which two cases are cited, *Fawcett* v. *Whitehouse,* 1 R. & M. 132, and *Hichens* v. *Congreve,* 1 R. & M. 150 n. I take it that is a correct statement of the law."

Following his cablegram of 28th January, plaintiff came to Canada to complete the transaction.

The purchaser was the defendant, Real Estate Investment Company, of which defendant Gardner was manager. The defendant Meredith was used, at the instance of defendant Company, as transferee, in order to facilitate registration of the documents. He had no interest in the matter. It is unnecessary further to allude to his connection with it. He immediately transferred the land to the defendant Company subject to mortgages, one being already on the land, the other being to plaintiff to secure balance of purchase money. On the closing of the transaction, the defendants Oldfield, Kirby & Gardner retained out of the purchase money, by way of commission, the sum of $709.35.

After the necessary documents had been signed and

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registered and the down payment made, plaintiff learned of the relationship between the defendant Gardner and the Real Estate Investment Company. He at once asked that the transaction be rescinded, offering to do his part. The rescission was refused, and this action was brought.

It is said that plaintiff must have known of the connection between the defendants because of the name of the defendant company appearing on the heading of the letter-paper of the defendants Oldfield, Kirby & Gardner. But that wording is in type so small as not to attract the attention of any one, and I accept plaintiff's denial that he knew anything of the connection referred to.

I find, on the facts, that the defendants Oldfield & Co. led the plaintiff to confide in them as his agents to get the best price and to allow them to close the bargain on his behalf, without disclosing to him that they were simultaneously acting for, and advising, Real Estate Investment Company in the purchase. I hold that this was a fraud on the plaintiff.

The defendants, the Real Estate Investment Company, set up that they had no notice either of the fact of the agency of their co-defendants for the plaintiff, or of the non-disclosure, and that, being purchasers for value, they are entitled to hold the land.

In this connection there was cited on behalf of the defendant company the case of *In re David Payne & Co., Limited,* [1904] 2 Ch. 608, where it was held that the knowledge of a single director of a lending company, that the borrowing company intended to apply the money towards purposes *ultra vires,* could not, in the circumstances of that case, be imputed to the lending company.

The present case, to my mind, depends upon an entirely different principle. It is not here a matter of imputing notice. The question really is: Can a party retain the benefit of a transaction which his agent has procured by means of fraud? It will be sufficient to refer

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to the case of *Pearson* v. *Dublin Corporation,* [1907] A. C. 351. There, the plaintiffs in an action of deceit against the public authority, with whom they had entered into a building contract, sought damages for fraudulent representations made by the agent of the public authority as to the nature of the work to be executed. That was not a case to set aside the transaction, as is this, but the principles of responsibility for an agent's fraud are the same in either case, it being merely a matter of the remedy applicable in different circumstances. In the case cited Lord Loreburn, L.C., said: "The principal and the agent are one, and it does not signify which of them made the incriminated statement, or which of them possessed the guilty knowledge." And Lord Halsbury quoted from the judgment of Willes, J., in *Barwick* v. *English Joint Stock Bank,* L.R., 2 Ex., 259, "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

The defendants, the Real Estate Investment Company, also contend that, having had issued to them a certificate of title to the land, they cannot now be divested of it.

Section 71 of The Real Property Act reads as follows: "Every certificate of title hereafter or heretofore issued under this Act shall, so long as the same remains in force and uncancelled, be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in such certificate is entitled to the land described therein, for the estate or interest therein specified, subject, however, to the right of any person to show that the land described in such certificate is subject to any of the exceptions or reservations mentioned in the seventieth or seventy-fourth sections of this Act, or to show fraud wherein the registered owner, mortgagee, or encumbrancee has participated, or colluded and as against such registered owner, mortgagee or en-

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cumbrancee; but the onus of proving that such certificate is so subject, or of proving such fraud, shall be upon the person alleging the same."

Section 76 of the Act, as far as important here, reads as follows:—"No action of ejectment or other action for the recovery of any land under the new system shall lie or be sustained against the registered owner for the estate or interest in respect of which he is so registered, except in the following cases, that is to say: (*d*) The case of a person deprived of any land by fraud as against the person registered as owner through fraud, or as against a person deriving his right or title otherwise than *bona fide* for value from or through a person so registered through fraud."

It is urged that fraud in these sections means only actual fraud, and that such is not present here. Reference was made to certain expressions contained in the judgment of the Privy Council in *The Assets Company* v. *Mere Roihi,* 21 Times L.R., 311, quoted in *Syndicat Lyonnais du Klondyke* v. *McGrade,* 36 S.C.R., 266, the words on which reliance is placed being: "By fraud in those acts was meant actual fraud—*i.e.,* dishonesty of some sort; not what was called constructive or equitable fraud, an unfortunate expression, and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flowed from fraud. Further, it appeared to their lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he bought from a prior registered owner, or from a person claiming under a title certified under Native Lands Acts, must be brought home to the person whose registered title was impeached, or to his agents. Fraud by the person from whom he claimed did not affect him unless knowledge of it was brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries which he omitted to make, did not, in itself, prove fraud on his part."

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The contention of defendant Company is that at most the case made is one of constructive fraud and that, in view of the words quoted from the decision of the Privy Council mentioned, the Company's certificate of title is not affected thereby. In the passage quoted a meaning is given to the expression, constructive fraud. Actual dishonesty of purpose is not an ingredient of constructive fraud. If it were it would be simply fraud, without any qualification.

Transactions such as purchases by an agent from his principal may involve nothing more than constructive fraud. But if, apart from the bare fact of the transaction, it is shown, as is the case here, that it has been brought about by improper conduct on the part of the agent, then the transaction is not confined to the more innocent class.

There will be judgment that, upon payment or tender by plaintiff to defendant Real Estate Investment Company of $6096.95 within one month from this judgment, the sale in question be set aside and that the defendants Real Estate Investment Company do thereupon transfer the land in question to the plaintiff subject to such incumbrances as existed thereon at the time of the transfer to the defendant Meredith by plaintiff, and that the defendants Real Estate Investment Company do account to the plaintiff for all rents, issues and profits of the said land since the transfer to the defendant Meredith. The plaintiff is to have his taxable costs of action without abatement against the defendants Oldfield, Kirby & Gardner and Real Estate Investment Company, including costs by reason of adding the defendant Meredith and the costs of the examinations for discovery.

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IN THE COURT OF APPEAL.

WOLFSON v. OLDFIELD. (No. 2)

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Appeal—Settlement of action—Finding of fraud—Academic question.

The defendants were the real estate firm of O. K. & G. and the Real Estate Investment Company, the purchaser of the property, and both appealed from the judgment of Robson, J., ante, but, before the hearing in this Court, the company abandoned its appeal, complied with the terms of the judgment and paid the plaintiff's costs. The company was not represented on the argument of the appeal of their co-defendants or made a party to it. There was no mention of fraud on the part of any person in the formal judgment, but O. K. & G. sought a reversal of the finding of fraud in the reasons for judgment given by the trial Judge.

Held, that, as the action had been settled as between the parties actually interested in the land, there was nothing left of the litigation but the academic question as to whether the agents had been guilty of any fraud in the transaction and the Court would not hear an appeal upon that.

DECIDED: 4th March, 1912.

Statement. AFTER the foregoing judgment in this suit was delivered by Robson, J., The Real Estate Investment Company appealed from it; but, before the hearing in this Court, abandoned its appeal, complied with the terms of the judgment and transferred the land to H. Phillipps, as trustee for the plaintiff. The Company also paid the plaintiff's costs.

The defendants, Oldfield, Kirby & Gardner, also appealed from the judgment of Robson, J., upon the ground that the finding of fraud as against them should be reversed, and were permitted by the Court of Appeal to give evidence to show that one of the cablegrams which was sent to the plaintiff was not put into cipher in the words or meaning in which it had been originally drafted by the defendant Gardner.

C. P. Wilson, K.C., and *J. B. Coyne* for defendants, appellants, cited *Hippisley* v. *Knee Bros.*, [1905] 1 K.B. 1; *Peek* v. *Derry*, 14 A.C. 337; *Barnes* v. *Addy*, L.R. 9 Ch. 244; *In re Cape Breton Company*, 26 Ch. D. 235;

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Weise v. *Wardle,* L.R. 19 Eq. 171; *Burstall* v. *Beyfus,* 26 Ch. D. 35; *Attwood* v. *Small,* 6 Cl. & F. 353; *Le Lievre* v. *Gould,* 68 L.T. 626; *Weir v. Bell,* 3 Ex. D. 243; *Joliffe* v. *Baker,* 11 Q.B.D. 270; *In re Companies Acts, ex parte Watson,* 57 L.J.Q.B. 613, and *In re Avery's Patent,* 56 L.J. Ch. 1007.

H. Phillipps and *H. W. Whitla* for plaintiff, respondent.

PERDUE, J. A. This action was brought against Oldfield, Kirby & Gardner, who are a firm of real estate agents, and The Real Estate Investment Company, to set aside a sale by the plaintiff to the company made through the intervention of the first named defendants. The facts of the case are fully set out in the judgment appealed from. The substance of the plaintiff's contention was that Oldfield, Kirby & Gardner were his agents and employed by him to find a purchaser of the land in question at the best price available; that the plaintiff relied upon them to act in his best interests; that they, concealing from him the fact that they were acting for the purchaser and in the purchaser's interest, induced him to make the sale.

The learned trial Judge, Robson, J., found in favor of the plaintiff. The sale was set aside and the Real Estate Company was ordered to transfer the land to the plaintiff upon the latter repaying the purchase money received by him. Both Oldfield, Kirby and Gardner and the Real Estate Company appealed from this judgment. Before the hearing in this Court the Company abandoned its appeal and complied with the terms of the judgment. The Company transferred the land to the plaintiff and paid his costs as ordered, and he refunded the purchase money. The Company was not represented on the argument of this appeal, or made a party to the appeal.

The matter now comes before the Court of Appeal in this anomalous position; the subject of the litigation is at

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an end and all parties submit to the terms of the judgment, yet Oldfield. Kirby & Gardner object that the trial Judge, in his reasons for judgment, or in the process of arriving at his conclusion, found that the action of Mr. Gardner was a fraud upon the plaintiff, and they desire to appeal against this finding.

The appellants object to no portion of the judgment as drawn up and entered. The judgment, as entered, only affects them in that they and the Company are ordered to pay the plaintiff's costs, and these costs have already been paid by the Company. All things ordered by the judgment to be done have been done and no party to the suit desires to disturb this state of things.

Affidavit evidence was offered on this appeal to show that there was no intentional fraud committed and that Mr. Gardner intended to disclose to the plaintiff that he was acting for the purchaser, but, through an error in his office, a message he directed to be sent was not sent in the form he intended. It is not necessary to consider whether the affidavit evidence is material, or whether, if it had been received by the trial Judge, it would have affected his judgment in any important respect. If the evidence is not material it need not be considered further. If it is material and, as the appealing defendants contend, rebuts the alleged fraudulent intent, then the trial Judge's whole conclusion as to the plaintiff's right to recover would have to be considered on this appeal, a course which could not be taken in the absence of the Real Estate Company, and in view of the fact that the Company has accepted and complied with the trial Judge's finding, so that the principals to the litigation, the vendor and the purchaser, are now concluded by the judgment.

There is no mention of fraud in the judgment as drawn up and entered. The finding of fraud could only be reviewed by this Court on an appeal from the whole

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judgment, and then only as an essential element found by the Judge in arriving at his conclusion. Where the real litigants have accepted that conclusion and are now bound by it, a consideration by this Court of the finding of fraud would be purely academic.

Oldfield, Kirby & Gardner's counsel contends that they were not proper parties to the suit. This exception, even if well taken, can have no effect upon the finding complained of. If they had not been made parties, the trial Judge might, in their absence, have made that finding if it was warranted by the evidence. In that case they, not being parties to the suit, would have had no *status* to bring an appeal.

I think the appeal must be dismissed.

CAMERON, J. A. This action was brought by the plaintiff to set aside the conveyance by him to the defendant the Real Estate Investment Company of certain lands sold to the Company by the defendants Oldfield, Kirby & Gardner, his agents. Relief was asked on various grounds; but the learned trial Judge based his judgment in favor of the plaintiff on the single ground that the defendants Oldfield, Kirby & Gardner did not, at the time of effecting the sale, disclose to the plaintiff that they were simultaneously acting for and advising the Company in the purchase and held that this was fraud on the plaintiff.

Formal judgment was accordingly entered ordering that, upon payment by the plaintiff of the purchase money received by him, the sale of the lands in question be rescinded, that the Company thereupon re-convey the lands to the plaintiff and account for any interim rents and profits, and that the Company and Oldfield, Kirby & Gardner pay the costs of the action.

From this judgment the Company appealed, asking to have the judgment set aside or varied and a judgment entered dismissing the plaintiff's action with costs. Old-

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field, Kirby & Gardner also appealed asking for the same relief or for a new trial. When the appeal came before us it was stated by counsel for the plaintiff that the terms of the judgment had been complied with, that the Company had re-conveyed the lands in question to the plaintiff, who had been paid his costs, and that he was not further interested in the matter. He, therefore, took no part in the argument. We have thus been without the advantage of having the evidence analyzed and discussed and the points of law brought before us examined from the plaintiff's standpoint.

Counsel for Oldfield, Kirby & Gardner, therefore, restricted their appeal, making it in fact an application to the Court to revise the written reasons for judgment of the trial Judge. He urged that upon the evidence at the trial, and upon the further evidence submitted on the hearing of the appeal, it appears that the defendant Gardner intended and attempted to disclose to the plaintiff his relation to the Investment Company. In this he relied more particularly upon a letter from the defendants Oldfield, Kirby & Gardner to the plaintiff's solicitors which was in evidence and also upon the wording of the cable message sent by Oldfield, Kirby & Gardner to the plaintiff on January 23, 1911, as originally drafted. He further pointed out that there was no allegation in the statement of claim that the non-disclosure complained of was with fraudulent intent, and insisted that such must be not only alleged but proved to hold these individual defendants liable. In other words these defendants to be held liable must be brought within the rule laid down in *Derry* v. *Peek,* 14 A.C. 359.

All these and other arguments were strongly urged upon us, and these individual defendants are certainly entitled to have them taken into consideration. But we are not asked to set aside or modify the judgment or send back the case for a new trial. We are really asked to

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write opinions or criticisms pointing out that the reasons assigned by the trial Judge for his judgment or the reasons by which he arrived at his conclusions are insufficient and erroneous and this after the judgment has been accepted and acted upon by the purchasers. It is not an appeal at all, but an application of the kind I have stated, viz.: to revise the written reasons for judgment of the trial Judge, a proceeding for which no precedent has been cited.

I have read the judgment in this matter prepared by Mr. Justice Perdue and agree with him that the motion must be refused.

HOWELL, C.J.M., and RICHARDS, J.A., concurred.

IN THE COURT OF APPEAL.

PEARSON v. O'BRIEN.

O'BRIEN v. PEARSON.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Contract—Consensus ad idem—Option to purchase land—Acceptance o offer with variation—Possession—Real Property Act, R.S.M., 1902, c. 148, s. 132—Caveat—Issue of certificate of title subject to claim of caveator.

The defendant Douglas, who lived in Moose Jaw, Saskatchewan, gave at Moose Jaw to the plaintiff, who lived in Winnipeg, an option to purchase within two days the property in question, which was in Winnipeg, for a named price and on certain terms of payment one of which was: "the difference in existing mortgage and what can be raised in excess of it to be paid to me as soon as new mortgage can be completed, the balance of my equity to be paid in three equal annual instalments with interest at 6% per annum."

The plaintiff returned to Winnipeg and made the cash payment required in time, but did not formally or otherwise accept the offer in the terms in which it was made. After some correspondence, Douglas executed a formal agreement of sale by which the balance of the purchase money was to be payable at Moose Jaw, and sent it to the plaintiff who changed it so as to make the money payable at par in Winnipeg, and then signed it and returned it to Douglas. The latter objected to the change and declared that he withdrew from the sale. He afterwards sold and transferred the property to the

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defendant O'Brien to whom a certificate of title under The Real Property Act was issued, which was expressed to be subject to the caveat which the plaintiff had registered based upon his said purchase from Douglas.

Held, (1) There was no completed agreement of sale from Douglas to the plaintiff, as the minds of the parties had never met upon all the terms of the proposed sale and Douglas had a right to withdraw from it as he did.

(2) The fact that the plaintiff had obtained possession of the property without the knowledge or consent of Douglas and collected the rents would not be such a possession as would take the case out of the Statute of Frauds, even if there had been a complete verbal agreement covering all material points.

(3) The acceptance by O'Brien of the transfer from Douglas and of the certificate of title subject to the plaintiff's caveat had not, under section 132 of the Real Property Act, in any way increased the rights or strengthened the position of the plaintiff under his caveat, or operated so as to prevent O'Brien from asking to have it vacated and discharged as a cloud on his title.

Re Moore and Confederation Life (1893) 9 M. R. 453, explained.

(4) The option itself, even if followed by an acceptance in writing, could not be treated as a complete agreement because it did not say whether the further mortgage contemplated by it was to be made by the vendor or the purchaser and did not state any of the terms of that mortgage or what rate of interest it was to bear.

Per MATHERS C. J.K.B. in the Court below. The alteration of the agreement by the plaintiff rendered it null and void.

DECIDED: 4th March, 1912.

Statement. ACTION by Pearson for specific performance of an agreement for the sale of land, and a cross action by O'Brien for the removal of a caveat affecting the same property. The two actions were tried together, when the following judgments were given:

MATHERS, C.J. K.B. On the 24th day of December, 1909, the defendant Douglas entered into an agreement with the defendant O'Brien for the exchange of a lot at the corner of St. Mary's Avenue and Colony Street in the City of Winnipeg, for some farm lands situate in Saskatchewan. The agreement was to have been carried out by the 15th of March, 1910, and, as it was not completed on that date owing to some difficulties about O'Brien's title to the farm lands, the defendant Douglas,

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assumed that it was at an end and that he was free to deal with his property as he chose and on the 24th day of May, 1910, gave the plaintiff, who had notice of O'Brien's claim, an option in writing to purchase the Winnipeg property.

Subsequently the defendant O'Brien brought an action in the Supreme Court of Saskatchewan against the defendant Douglas for specific performance of the agreement of the 24th of December, 1909, and at the trial before Mr. Justice Newlands judgment was given for the specific performance of that agreement, or in the alternative, for the payment of $2,000 damages. Both parties entered an appeal but, before the appeal was heard, the parties got together and settled the action and Douglas transferred the lot in question to O'Brien, and a certificate of title was issued by the Land Titles Office at Winnipeg therefor to O'Brien subject to a caveat which had been previously registered by the plaintiff.

Both the defendants O'Brien and Douglas resided at the City of Moose Jaw in Saskatchewan, and the plaintiff resided in the City of Winnipeg. Negotiations between the plaintiff and Douglas were opened in Moose Jaw on the 24th of May, 1910, by an interview between the plaintiff and Douglas. This interview resulted in Douglas writing and signing the following option, which he delivered to plaintiff:

"Moose Jaw, May 24th, 1910.

"I hereby agree to accept $9,750 for my house on Colony Street, 257, on the following terms, $2,000 cash by May 26th; the difference in existing mortgage and what can be raised in excess of it to be paid to me as soon as new mortgage can be completed, the balance of my equity to be paid in three equal annual instalments with interest at 6 per cent. per annum. This agreement to last until May 26th, 1910, and is given to Mr. George A. Pearson. It is understood that there is no commission or brokerage fees."

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The plaintiff returned to Winnipeg with this document in his possession and on the next day, the 25th of May, he wrote a letter to the defendant Douglas, the first and material paragraph of which is as follows:

"Enclosed you will find a cheque payable to your order at par in Moose Jaw for the $2,000, being first payment on the above property, and agreement of sale on same already signed and witnessed by me in accordance with my option which you gave me yesterday."

With that letter was enclosed a cheque payable at par at Moose Jaw to the order of the defendant Douglas for $2,000 and bearing this memo.—"Being first payment in full on lot 26 and south half lots 23 and 25, 85 St. James, Plan 127; Price $9,750 payable $2,000 cash, balance of equity in one, two and three years at 6 per cent. annually."

Enclosed also was a formal agreement executed by the plaintiff containing many terms in addition to those mentioned in the option and according to which the purchase price was payable to the vendor at Winnipeg.

The agreement was not acceptable to Douglas, and his solicitors drew another, adding a special clause as to the mortgage to be placed on the premises and making the purchase price payable at Moose Jaw. This latter agreement was executed by Douglas and forwarded by his solicitors to the plaintiff, with a letter stating that they had added this additional clause, but, contrary to the fact, that in all other respects it was exactly the same as the one he had prepared.

Upon receipt of this agreement signed by Douglas the plaintiff altered it so as to make the purchase money payable at par in Winnipeg. He then executed it and returned it to the defendant's solicitors in a letter dated the 30th of May.

Immediately upon receipt of this last mentioned letter, Douglas' solicitors replied by a letter, dated the 2nd of June, objecting that the change of place of payment

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Moose Jaw to Winnipeg was not satisfactory to client and that they were instructed to say that he withdrew from the agreement and would not now conclude it upon the present basis.

The action was based on this altered agreement, plaintiff contending that the alteration did not render the agreement void. I cannot agree with this contention. The alteration was, to my mind, clearly material. If no place of payment were specified, the law would imply that payment must be made at Moose Jaw, upon the principle that the debtor must seek his creditor.

Before the Bills of Exchange Act (and now by the express terms of the Act) the unauthorized change of the place of payment rendered the bill void: *Burchfield* v. *Moore,* 3 E. & B. 683. The same principle applies to other instruments. The cases will be found collected in the notes to *Master* v. *Miller,* 1 Sm. L. Ca. 800.

The cases relied upon by the plaintiff as showing that this change does not void the agreement are quite distinguishable, but I do not intend to further refer to them, as it appears to me a plain case in which a material change has been made which voids the agreement.

The next question is, do the option and cheque constitute a sufficient memorandum within the Statute of Frauds? In my opinion they do not. The cheque does not constitute an acceptance of the offer contained in the option. It does not in the first place refer to the same terms. By the option there is a provision for raising a mortgage and the balance of the equity, after payment of this mortgage, is to be paid in three equal annual instalments; by the terms written on the cheque the whole balance after payment of the $2,000 is to be paid in one, two and three years. Besides this the cheque in no way refers to the option.

Where the contract relied upon is not contained in one

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document, all the documents relied upon must refer to each other: *Fry on Specific Performance,* par. 538.

It is said, however, that both these documents are referred to in the letter of May 25th from the plaintiff to the defendant Douglas, and are thus sufficiently identified. The letter also, however, encloses an agreement which must be looked to. The option itself was but an offer which the defendant Douglas makes to sell his property to the plaintiff on the terms therein specified. The letter of May 25th enclosing the cheque and the agreement constitutes the plaintiff's acceptance of that offer, if any. The terms specified in the cheque are not the same as the terms of the defendant's offer, and the agreement enclosed specifies Winnipeg as the place of payment, which is also a term not included in the defendant's offer. The plaintiff does not accept Douglas' offer unconditionally, but subject to certain new terms. Douglas does not agree to the plaintiff's proposed terms but has drawn and executes a document setting out the terms on which he is willing to sell. The plaintiff refuses to accept this latter agreement and Douglas withdraws from the negotiations.

It appears to me clearly a case where there never was an agreement arrived at between the parties. I refer to the cases of *Jones* v. *Daniel,* [1894] 2 Ch. 332, and *Crossley* v. *Maycock,* L.R. 18 Eq. 180, as being very much in point.

After the plaintiff had been notified of Douglas' withdrawal from further negotiations, the plaintiff's solicitors on his behalf offered to make the payments at Moose Jaw, but Douglas adhered to his refusal to conclude an agreement with the plaintiff until he had got O'Brien's claim disposed of. I can see nothing in the subsequent conduct of Douglas to indicate that such was not his attitude throughout. The possession relied upon by the plaintiff cannot help him. He was not put in possession by

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Douglas. He procured the keys, not from the defendant's agent, but from an entire stranger, and in this way got possession. Being in possession, Douglas consented to his collecting the rents pending the settlement of their dispute, but at the same time protesting that the plaintiff had no agreement with him. The subsequent payment of a portion of the taxes did not constitute an agreement, nor does it amount to an admission by the defendant that the plaintiff had an agreement binding upon him.

In my opinion Douglas never agreed to sell on the terms proposed by the plaintiff, and therefore the action must be dismissed as against both defendants with costs, including costs of examination for discovery.

O'BRIEN v. PEARSON.

MATHERS, C.J. K.B. This is an action by O'Brien referred to in the foregoing judgment against the plaintiff named therein for the removal of the caveat registered by the latter against the Winnipeg property. The two actions were tried together. As I have found in *Pearson v. O'Brien,* that there was no agreement for the sale by Douglas to Pearson of the land in question, it follows that Pearson has no right to maintain a caveat against it. There will be judgment discharging the caveat registered by the defendant, with costs of suit. O'Brien is entitled to possession of the lands and to the rents thereof received by Pearson, to take an account of which it is referred to the master. Further directions and costs of reference reserved.

Both parties appealed.

C. P. Wilson, K.C., and *W. H. Trueman* for Pearson, appellant in both cases, cited: *Fessard* v. *Mugnier,* 34 L.J.C.P. 126; *Wells* v. *Brigham,* 60 Mass. 8; *Gibbins* v. *North Eastern,* 11 Beav. 1; *Andrews* v. *Calori,* 38 S.C.R. 588; *Munroe* v. *Heubach,* 18 M.R. 450, 547; *Bellamy* v. *Debenham,* 45 Ch. D. 481; *Cayley* v. *Walpole,* 22 L.T.N.S. 900; *Gray* v. *Smith,* 43 Ch. D. 208;

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London & Provincial Bank v. *Roberts*, 22 W.R. 402; *Fullerton* v. *Brydges*, 10 M.R. 431; *Re Moore and Confederation Life Association*, 9 M.R. 453; *Alexander* v. *Gesman*, 4 Sask. 111; *Taylor* v. *Land Bank*, 12 V.L.R. 748; *Dyas* v. *Rooney*, 27 L.R. Ir. 4, and *Harris* v. *Robinson*, 21 S.C.R. 390.

I Pitblado, K.C. and *H. V. Hudson* for Douglas in *Pearson* v. *Douglas*, cited: *Green* v. *Stevenson*, 9 O.L.R. 671; *Jones* v. *Daniel*, [1894] 2 Ch. 332; *Gibbins* v. *North Eastern*, 11 Beav. 1; *Crossley* v. *Maycock*, L.R. 18 Eq. 180; *Queen's College* v. *Jayne*, 10 O.L.R. 319; *Bristol* v. *Maggs*, 44 Ch. D. 616; *Hussey* v. *Horne-Payne*, 4 A.C. 311; *Bohan* v. *Galbraith*, 13 O.L.R. 301, affirmed 15 O.L.R. 37; *N.W. Transportation Co.* v. *McKenzie*, 25 S.C.R. 38; *Winn* v. *Bull*, 7 Ch. D. 29; *Stow* v. *Currie*, 21 O.L.R. 486; *Warner* v. *Willington*, 3 Dr. 523, 533; *Andrews* v. *Calori*, 38 S.C.R. 588; *Bellamy* v. *Debenham*, 45 Ch. D. 481; *Munroe* v. *Heubach*, 18 M.R. 450, 547; *Calloway* v. *Stobart*, 35 S.C.R. 301; *Master* v. *Miller*, 1 Smith's L. Cas. 767; *Burchfield* v. *Moore*, 3 E. & B. 683; *Davidson* v. *Cooper*, 11 M. & W. 778; *Bank of Hindostan* v. *Smith*, 36 L.J.C.P. 241; *Hyde* v. *Wrench*, 3 Beav. 334; *Stevenson* v. *McLean*, 5 Q.B.D. 346; *Robey* v. *Snaefell*, 20 Q.B.D. 152, and *Fessard* v. *Mugnier*, 34 L.J.C.P. 126.

J. E. O'Connor and *A. G. Kemp* for O'Brien cited: *Harris* v. *Robinson*, 21 S.C.R. 390; *Brown* v. *Hoare*, 16 M.R. 314; *Leslie* v. *Preston*, 7 Gr. 434; *Pither* v. *Manley*, 32 S.C.R. 651; *Draper* v. *Radenhurst*; 21 S.C.R. 715; *Re Moore*, 9 M.R. 453; *Alexander* v. *Gesman*, 4 Sask. 111, and *Hickey* v. *Legresley*, 15 M.R. 304.

C. P. Wilson, K.C., and *W. H. Trueman* in reply cited: *Jones* v. *Daniel*, [1894] 2 Ch. 335; *Bristol* v. *Maggs*, 44 Ch. D. 616, 623; *Stow* v. *Currie*, 21 O.L.R. 486; *Anderson* v. *Douglas*, 18 M.R. 254; *Queen's*

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College v. *Jayne,* 10 O.L.R. 319; *Cayley* v. *Walpole,* 22 L.T.N.S. 900; *Clergue* v. *McKay,* 6 O.L.R. 51; *Devine* v. *Griffin,* 4 Gr. 603; *Pattinson* v. *Luckley,* L.R. 10 Ex. 330, and *Potter* v. *Sanders,* 6 Hare 1.

J. E. O'Connor and *A. G. Kemp* in reply cited *Kruse* v. *Johnson,* [1898] 2 Q.B. 91; *Quinn* v. *Leathem,* [1901] A.C. 511; *Kelly* v. *Kellond,* 20 Q.B.D. 572, and *Fortescue* v. *Vestry of St. Matthew,* [1891] 2 Q.B. 170.

RICHARDS, J.A. The facts are set out in the judgment of the learned trial Judge, who found that there was no evidence of a completed contract between Douglas and Pearson. I agree fully with the views taken by him and shall try not to repeat his grounds.

Apparently before him the contract relied on was the formal agreement prepared by Douglas' solicitors and sent to Pearson, and which Pearson altered after its execution by Douglas.

Before this Court a strong argument was made that a contract was shown by the option—I mean by that the informal instrument entered into at Moose Jaw at the end of the first negotiation between Pearson and Douglas. It is said that this was in itself a contract and that in any event the use by Douglas of the cheque is a ratification of it.

This latter view, I think, is met by the fact that, even if the option and the cheque could together form a contract, they do not refer to each other. Further, they differ in their terms, as pointed out by the learned trial Judge. Also, as pointed out to him, when Douglas banked the cheque he used it supposing it to be a payment under the formal agreement and was not aware of the alteration made by Pearson in that agreement.

What seems to me a fatal objection to treating the option as a contract is that it not only does not say whether

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the vendor or vendee is to make the further mortgage contemplated by it, but it also does not state any of the terms of that mortgage, or the rate of interest it is to bear. The object of it, patently, was to raise as much cash as possible for Douglas, but the amount of cash which could be raised would be materially influenced by the rate of interest, a larger sum being likely to be advanced in consideration of getting a higher rate of interest. Is it to be assumed that Douglas, in order to increase this amount, could make or insist on the new mortgage bearing 12% or 15% interest, and fixed terms of repayment of the principal that Pearson could be forced to agree to? If not, where is the certainty as to the terms of the new mortgage?

I think, too, that the correspondence and acts of the parties show distinctly that the option was not to be the final contract, but that the only final contract intended was to be the formal agreement.

It is argued that the terms of the agreement were that the purchase money was to be payable in Winnipeg and not in Moose Jaw. There is nothing in the option referring to this, and the fact that Pearson made his cheque for the cash payment of $2,000 payable at par in Moose Jaw seems to me strong evidence that his understanding was that the purchase money should be payable there.

Pearson relies on the possession taken by him, and on the payment of part of the taxes by him, as part performance, to take the case out of the Statute of Frauds. The payment of the taxes is, I think, no part performance. Douglas also was paying a portion of the taxes, and it is evident, I think, that payment of a part by each was meant to be only a temporary arrangement until the rights of the parties could be settled, because they were then at arm's length.

As to the possession, in addition to the fact pointed out by the learned trial Judge, that Pearson did not get

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this possession with Douglas' privity or consent, it seems to me that, in any event, it was not such a possession as Pearson could rely upon. Possession, to be of any value as against the statute, must be in pursuance of a completed agreement, whether verbal or written, and such as could be enforced by the Court if in writing; and I find none such here. Furthermore I do not see that any injustice would result to Pearson from his taking possession, as he did, if specific performance is not ordered. He merely took the property and collected rents, and it would, therefore, be no fraud upon him to refuse to carry out the contract.

But counsel for Pearson, on the hearing of the appeal, raised a question, apparently not discussed before the learned trial Judge, and which is not taken in the præcipe on appeal and which was not pleaded in the sense in which the question is now raised. I refer to the argument that the acceptance by O'Brien of the certificate of title, subject to Pearson's caveat, is, by virtue of the Real Property Act, an admission that the contract upon which the caveat was filed is a valid, complete and binding contract upon O'Brien, and enforceable against him.

In favor of that argument the only two points that I can see are, first, the provisions of section 132 of the Real Property Act, and second, the decision of the Court of King's Bench in *Re Moore and Confederation Life Association*, 9 M.R. 453.

Section 132 says: "So long as any caveat prohibiting the transfer * * remains in force, the District Registrar shall not register any instrument purporting to transfer * * the land * * unless such instrument be expressed to be subject to the claim of the caveator."

In *Re Moore and Confederation Life*, the certificate of title was in favor of a woman as "sole surviving executrix and devisee under the will of....." subject to cer-

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tain incumbrances. Certain of these incumbrances had been put on by herself as against her interest as devisee. It was held that the reference to her as "sole surviving executrix and devisee" were words of description, and did not enable her, while holding the certificate in that form, to exercise certain powers under the will by which she could give priority to a transfer by her, as executrix, over the instruments created by herself as devisee. In giving the judgment of the Court Mr. Justice Killam uses this expression: "Here the District Registrar has found in the registered owner a power inconsistent with two of the incumbrances named, which seems to us wholly opposed to the principles of the Real Property Act, *as that Act makes a certificate of title final at each stage.*"

The underlined words are relied on as a holding sufficiently broad to cover the contention that, in the present case, the taking of the certificate of title, subject to the caveat, is an admission that the agreement on which that caveat was founded was binding on the certificatee, O'Brien.

The purpose of the caveat is to give notice of a claim, but not in any way to validate or better the condition of that claim; and all reasonable purposes of the Act are fulfilled by continuing notice of that claim upon a certificate issued after it is filed. That leaves the caveator in precisely the same position, as against the new certificatee, as he had been in against the old one. An interpretation, which would give a caveator, by virtue of the statute, a right which did not previously exist, could only be upheld on the strength of legislation so worded as to have no other meaning; and I do not find such legislation in the Real Property Act. The words, "unless such instrument be expressed to be subject to the claim of the caveator," seem to mean merely such claim, if any, as the caveator had by virtue of that alleged right upon which his caveat was filed, whatever that might be.

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Referring to *Re Moore and Confederation Life*, section 71 of the Act says that "each certificate of title * * shall * * be conclusive evidence at law and in equity * * that *the person named in such certificate* is entitled to the land described therein for the estate or interest therein specified."

It is only as in the sense above mentioned that the judgment in *Re Moore and Confederation Life* says that the Act makes a certificate of title final at each stage. The certificate there had issued, as stated above, subject to two incumbrances put on by the certificatee herself, and, if the words "surviving executrix and devisee" were merely descriptive of the certificatee, then the judgment was right in saying that, while the certificate stayed in force, it was final as against her, the certificatee's, right to prefer a new party to certain of these incumbrances which she herself had placed upon the property. I cannot see that the words could be in any way stretched so as to uphold the present contention of Mr. Pearson's counsel.

Section 70 says that the land mentioned in any certificate of title shall by implication be deemed to be "subject to" any certificate of *lis pendens* issued out of any court of competent jurisdiction in this Province, and duly registered since the date of the certificate of title. A *lis pendens* is notice of a claim, and that action has been taken to enforce an alleged right, just as a caveat is notice of a claim to an alleged right. The words "subject to" are used in section 70 as in section 132. If the wording of section 132 means that the validity of the agreement upon which the caveat is filed is admitted, then I see no reason why it should not equally be held that, under section 70, the mere filing of a *lis pendens* against land, the title to which is under the Act, should, in itself, prove the claim of the plaintiff in the action on which the *lis pendens* was filed. The answer to this, I

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assume, would be that the filing of the *lis pendens* in no way depends on the volition of the certificatee, while the taking of a new certificate subject to a caveat is an act which does depend on the volition of the new certificatee. Though there is that difference, I am unable to see why that construction should be put upon section 132 merely because of that act of volition. The words in both sections are "subject to."

It may be a matter of great importance to a purchaser to get his certificate at once. He may have the fullest knowledge that the claim of the caveator is shadowy and insubstantial and quite incapable of being enforced. He may have further parties to whom he is willing to sell, who are willing to take it without having the caveat taken off; yet, if the plaintiff's contention is correct, he must wait until he might lose his own sale, while he takes proceedings to get rid of a caveat. It seems to me that, to uphold the contention of the plaintiff, would be to put it in the power of unscrupulous persons to levy blackmail by placing caveats under such circumstances. There is no principle of justice or merit involved in the contention, but rather one of possible great injustice.

I would dismiss the appeals with costs.

PERDUE, J.A. These two actions were tried together. The facts involved are fully set forth in the judgment of Mathers, C.J.K.B.

On 24th May, 1910, Douglas, at Moose Jaw, gave to Pearson a written offer to sell the land in question for $9,750 on the terms mentioned in the writing. The document is set forth in full in the judgment from which this appeal is brought. One of the terms was payment of $2,000 by 26th May. A further term was that Douglas was to receive the difference between what could be borrowed upon the property in excess of the existing mortgage as soon as the new mortgage could be completed. These two sums, the $2,000

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and the balance of the new loan after paying the existing mortgage, would together make up the amount which the defendant expected to receive in the way of payment down, as distinct from the postponed payments. The remainder of the purchase money, after deducting the above two sums, was to be paid in three equal annual instalments with interest at six per cent. per annum.

On 25th May, the plaintiff Pearson, who resides at Winnipeg, wrote the defendant Douglas, forwarding him a cheque for $2,000, payable at par in Moose Jaw where the defendant resides. There was not in the letter any explicit acceptance of defendant's offer. Written into the body of the cheque were the words: "being first payment in full of Lot 26 and S. ½ of Lots 23, 25, in 85 St. James, Plan 127, price 9750, payable 2000 cash, balance of equity in 1-2-3 years at 6% annually." The terms as set forth in the cheque differ from those in the offer in that nothing is said as to the amount to be raised by loan. This is a substantial difference, as the terms mentioned in the cheque would give the defendant less in the way of early payment and would increase the amount of the postponed payments. There was not, therefore, an unqualified acceptance of the terms contained in the offer.

Enclosed with his letter of 25th May Pearson forwarded a formal agreement which had been signed by him and which he requested Douglas to sign. This document contained a number of provisions in addition to, or differing from, the terms mentioned in the defendant's offer. Two of them are of importance. The purchase money was, in the first place, made payable, by the terms of this document, to the vendor at Winnipeg. In the next place it provided that upon payment of ..... dollars (the amount being left blank) of the purchase money, the purchaser might ask for and the vendor should give a deed or transfer of the land upon the purchaser giving

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a first mortgage on the land to secure the balance of the purchase money.

The defendant Douglas did not execute this agreement, but his solicitors prepared a new one containing for the most part terms similar to those contained in the agreement forwarded by the plaintiff. But, in the document prepared at defendant's instance, the purchase money was made payable at Moose Jaw, Saskatchewan, and the whole provision as to the purchaser obtaining a transfer, upon giving a mortgage, was struck out of the printed form. The document also contained a covenant that the plaintiff would indemnify Douglas against liability on the new mortgage to be placed upon the land. This document was executed by Douglas and sent by his solicitors to the plaintiff, they in their letter calling particular attention to the covenant of indemnity. On receiving this document from the defendant, the plaintiff altered it by inserting, in the clause stating the place of payment, the words "but" and "at par in Winnipeg." He then executed the document and returned it to Douglas' solicitors, with a letter in which he thus refers to the change he had made: "You changed the place of payment from Winnipeg to Moose Jaw and, as the property is here, it is only proper to have the payments payable at par in Winnipeg, which you will see I have changed." This letter was written on 30th May. On 2nd June Douglas' solicitors wrote to the plaintiff saying that he had changed the agreement so that as it stood it was not the contract executed by the defendant. They said the change was not satisfactory to their client and that he withdrew from the agreement.

It rests upon the plaintiff to show that there was a concluded agreement between him and Douglas, and that there was a sufficient memorandum in writing signed by the defendant to satisfy the requirements of the Statute of Frauds. I cannot find from the above corres-

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pondence and documents that there was at any time a concluded agreement arrived at between the parties. It has already been shown that there was no straight acceptance of the offer of 24th May. The agreement sent by the plaintiff on 25th May was altered by Douglas in three respects (1) as to place of payment; (2) by striking out the clause as to giving a transfer and accepting a mortgage, (3) by inserting a covenant for indemnity. This agreement was in turn altered by the plaintiff, after it had been signed by the defendant, by inserting a provision which, although it left Moose Jaw as the place of payment, made the money payable at par in Winnipeg. This would throw upon Douglas the expense of transmitting the money from Winnipeg and paying it at Moose Jaw. It is argued that this was not a material alteration. I do not think that effect can be given to such a contention. The place of payment is a material matter in a contract: *Burchfield* v. *Moore,* 3 E. & B. 683. The defendant insisted upon making Moose Jaw the place where payment should be made. The plaintiff, while agreeing to this, interpolated in the contract a new or added condition that would impose upon the defendant the expense of the transmission and payment of the money. This would clearly affect the defendant adversely and was a material alteration. This addition to the document, made after it had been signed by the defendant and without his consent, avoided it as against him: *Master* v. *Miller,* 4 T.R. 320; *Leake on Con.* 6th ed. 589. If the agreement had been silent as to the place of payment the law would presume that the money should be paid at Moose Jaw where Douglas resided and where the offer was made: *Fessard* v. *Mugnier,* 34 L.J. C.P. 126; *Robey* v. *Snaefell,* 20 Q.B.D. 152. But in any event the defendant imposed the condition that the money should be paid to him at Moose Jaw.

The fact that the defendant Douglas cashed the cheque

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cannot assist the plaintiff. It was cashed before the defendant knew of the alteration made by the plaintiff in the agreement, and in the belief that the form of contract executed by the defendant would be accepted by the plaintiff. After the negotiations fell through the defendant offered to return the money and he repeats this offer in his pleading.

The plaintiff's own evidence shows that the whole terms of the alleged purchase were not settled at the interview with the defendant at Moose Jaw when the written offer or option of 24th May was given. The plaintiff admits that certain terms were left indefinite. He does not clearly state whether he or the defendant should execute the new mortgage. He says he was to get an agreement of sale when the caveat fyled by the defendant O'Brien should be discharged. While admitting that the terms were left indefinite on 24th May, he relies upon the subsequent settlement of the terms set out in the formal agreements. It is clear that neither of these formal agreements was definitely accepted by both of the parties before the defendant declared the negotiations off. Looking at all the writings that passed between the parties, it does not appear that at any point there was a concluded contract between the parties expressed in these writings. All the documents must be taken into consideration in finding such a contract. The plaintiff cannot select some of the writings and say that these sufficiently evidence a contract, regardless of the fact that there were other important conditions of the intended contract which were not embraced in the writings and were still unsettled: *Hussey* v. *Horne-Payne,* 4 A.C. 311, 323; *Bristol, &c. Co.* v. *Maggs,* 44 Ch. D. 616; *Stow* v. *Currie,* 21 O.L.R. 486; *Queen's College* v. *Jayne,* 10 O.L.R. 319; *Bohan* v. *Galbraith,* 15 O.L.R. 37.

I agree with the learned trial Judge's finding as to the effect of the plaintiff's possession of the premises and the

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payment by the plaintiff of a portion of the taxes. The plaintiff was not put in possession by Douglas, and the latter was not aware that such possession had been taken until after he had declared the contract off. Taking possession, if relied on as a part performance, must be taken with the knowledge of the person to be charged: *Fry, Specific Per.* 5th ed. par. 587, 588. Besides, there was no concluded contract of which there could be part performance: *Fry,* par. 597.

Mr. Wilson advanced a new point upon the argument before this Court, one which had not been taken before the trial Judge, or raised in the praecipe. O'Brien, who is a defendant in the suit brought by Pearson and is plaintiff in the suit brought to set aside Pearson's caveat, had taken a transfer from Douglas, subject to Pearson's caveat, and had obtained a certificate of title subject to the last mentioned caveat. Mr. Wilson contended that the effect of O'Brien's taking a certificate of title subject to Pearson's caveat was that O'Brien thereby admitted the claim set forth in the caveat and that such claim was no longer controversial but became an established interest in the land. The effect of this startling proposition would be that a mere *lis* or disputed claim would, if it formed the subject of a caveat filed against the land, become, as against a transferee who took his certificate of title subject to the caveat, an actual and indisputable interest in, or charge upon, the land. The point was urged very fully by counsel upon both sides and it becomes necessary to consider it at some length.

The Real Property Act, R.S.M. c. 148, in sections 127-145, treats of caveats, their effect and the procedure to be followed in dealing with them. Sections 127-129 relate to caveats filed where an application is pending to bring the land under the operation of the Real Property Act and before a certificate of title has been issued to any person. In such cases the district registrar shall not

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bring the land under the new system until all caveats shall have been disposed of: section 128. Where a caveat is filed forbidding the bringing of the land under the Act, it operates as an injunction against the issue of a certificate of title to the person applying to be registered as owner of the land.

Sections 130-132 deal with caveats filed after the land has been brought under the new system. Section 130 is as follows:

"130. Any person claiming an estate or interest in land, mortgage or incumbrance under the new system, may file or cause to be filed on his behalf with the district registrar a caveat in the form in Schedule H to this Act, forbidding the registration of any person as transferee or owner of, or of any instrument affecting such estate or interest, or unless such instrument be expressed to be subject to the claim of the caveator."

Section 131 declares that such caveat shall be deemed to have lapsed upon the expiration of fourteen days after notice given to the caveator to take proceedings in Court on his caveat, unless certain procedure is followed and certain things are done as provided by the section.

Section 132 is as follows: "132. So long as any caveat prohibiting the transfer or other dealing with any land, mortgage or incumbrance remains in force, the district registrar shall not register any instrument purporting to transfer, mortgage or incumber the land, mortgage or incumbrance in respect to which such caveat is lodged, unless such instrument be expressed to be subject to the claim of the caveator."

It is to be observed that section 130 enables the caveator to forbid (1) the registration of any person as transferee or owner of the estate or interest claimed by the caveator, or (2) he may forbid the registration of any instrument affecting such estate or interest, or (3) he may forbid the registration, unless the instrument is

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expressed to be subject to the claim of the caveator. Whichever of these modes of procedure the caveator adopts, the district registrar is prohibited from registering any instrument purporting to transfer, mortgage or incumber the land, &c., in respect of which the caveat is lodged, unless such instrument is expressed to be subject to the claim of the caveator: section 132.

The form of caveat provided by the Act, schedule H, and referred to in section 130, is not altogether appropriate to the several things permitted by the section, but this is not very material in view of the effect which is given by section 132 to all caveats filed after the land is brought under the Act. By that section, if a caveat has been filed after the land has been brought under the Act, even if the caveat absolutely forbids the transfer or other dealing with the land, &c., the district registrar is prohibited from registering an instrument purporting to deal with it "unless such instrument be expressed to be subject to the claim of the caveator." The intention of this would seem plainly to be that a transfer or other dealing with the land may be put through by the district registrar subject to any existing caveat filed after the first certificate of title has been issued, and that in such case the transferee would take his rights subject to the claim set out in the caveat, whatever that claim might be, so that the right of the caveator might be preserved and remain as valid against the transferee as it was against the transferor, but that no additional force should be given to such claim by making the new certificate of title subject to it.

Mr. Wilson argued that the form of the certificate of title given in schedule A to the Act, which declares that the title mentioned in the certificate is "subject to such incumbrances, liens and interests as are notified by memorandum underwritten (or indorsed hereon)," makes no mention of "claims" and that anything underwritten or indorsed upon the certificate must be taken to be an

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actual, established interest. I think it is clear that the word "interests" includes interests that are merely claimed as well as those that are established or admitted.

Section 70 makes the land in the certificate subject, by implication, to caveats affecting the land registered since the date of the certificate of title: sub-section (*j*). If, in such a case, the registered owner transfers, subject to caveat, to a third party who takes a new certificate subject to the caveat, the caveator's position is not altered, he has the same rights against the transferee that he had against the transferor, but it would be unreasonable to expect that he should have more. That the Act intended to do more than preserve his rights in case of a dealing with the land cannot be gathered from its provisions.

Section 145 provides that, "Any person claiming any estate or interest in land, mortgage or incumbrance subject to or under the new system may in lieu of or after filing a caveat, proceed by way of statement of claim, and may file with the district registrar a certificate of *lis pendens* or other proper evidence of such proceedings." It will be seen that this provision extends to all persons referred to in section 130 and applies not only to lands, &c., under the new system, but also to lands, &c., "subject to" the new system. The words "subject to" refer to lands in respect of which an application to bring them under the Act has been made, but in respect of which a certificate of title has not yet been issued. Such lands, covered by a pending application, are, by section 34, declared to be "subject to the new system," and no registration under the old system affects them until the application is withdrawn or rejected. Section 145, therefore, permits the bringing of a suit and the filing of a certificate of *lis pendens* in lieu of a caveat whether before or after the issue of a certificate of title. This clearly shows that the filing of a caveat has no greater effect, in so far as the rights or interests of the caveator in the land are

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concerned, than it would have if the same person had proceeded by statement of claim and had filed a certificate of *lis pendens*.

Mr. Wilson based his argument upon this branch of the appeal largely upon some expressions that occur in the judgment of the Court of King's Bench in *Re Moore and Confederation Life*, 9 M.R. 453. In that case a certificate of title had been issued to Emma Moore, sole surviving executrix and devisee under the will of William Beall deceased, subject to certain incumbrances consisting of a mortgage made by the testator, a charge of a legacy under his will to his daughter, a mortgage made by Emma Beall upon her own interest as devisee only and a writ of *fi. fa.* lands against Emma Beall's interest as devisee only. Emma Moore was the widow of the testator and after the death of her husband had married one Moore. She was the same person as Emma Beall. The executrix attempted to sell the property for the purpose of paying debts and legacies, under power conferred on her by the will, and thus to cut out the two latter of the incumbrances. It was held that the certificate of title did not show that she possessed a power inconsistent with her right as devisee or enabling her to over-ride these incumbrances. The whole point in that case was that a certificate issued to E. M. "sole surviving executrix and devisee under the will," &c., did not show that she had powers enabling her to nullify incumbrances against her as devisee. The words "sole surviving executrix," &c., were taken as mere description and not as showing that the certificate of title had been issued to her in her capacity of executrix and with the powers given her by the will. If the certificate had been issued to E. M. as executrix and the will had been sufficiently embodied in the certificate, the difficulty that arose in the case would have been obviated. I am informed by the District Registrar that the certificate was afterwards amended by

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him and the will was spread upon its face. This overcame the difficulty. Section 69 of the present Act prevents any such question from arising in the future. Much was sought to be made of an expression used by Killam, J., in delivering the judgment of the Court, that the Act makes a certificate of title final at each stage. That is true to this extent, that every certificate of title has the conclusive effect given to it by the Act: sections 71, 77. The want of finality in the certificate in *Re Moore and Confederation Life* was that a person apparently registered as owner in one right sought to exercise powers in another right. The certificate is conclusive evidence that the person named in the certificate is entitled to the land for the estate or interest therein specified, subject to the right of any person to show that the land is subject to any of the exceptions or reservations mentioned in the seventieth and seventy-fourth sections or to show fraud: section 71. This fraud must be one wherein "the registered owner, mortgagee or *incumbrancer* (*sic*) has participated or colluded," and must be shown "as against such registered owner, mortgagee or incumbrancee." The meaning of this seems to be that a certificate of title may be set aside for fraud in the registered owner in obtaining it and that his mortgagee or incumbrancee may also be attacked if such mortgagee or incumbrancee has participated in the fraud: compare section 76, sub-section (*c*). The mortgagee or incumbrancee has only a security upon the land, he has no estate or interest in it: section 100. The estate or interest referred to in section 71, of which the certificate of title is made conclusive evidence, is only the estate or interest of the registered owner specified in the certificate. It may be shown that a registered mortgage has been paid off, that a judgment appearing on the certificate of title has been satisfied, or that the judgment debtor is not in fact the same person as the registered owner, or that a

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caveat should be removed, although the instrument in each of these cases has been entered upon the certificate of title.

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I think that when O'Brien took a transfer and certificate of title, both subject to the caveat filed by Pearson, the rights of the latter, if any, as against the land were in no wise diminished or improved. When the new certificate of title was issued, with his caveat endorsed upon it, Pearson's rights or interests in the land, whatever they might be, were left exactly as they were before the transfer, so that he might proceed to enforce his interest against the land in O'Brien's hands, in the same manner as if Douglas were still the registered owner.

I think the appeals in both suits should be dismissed with costs.

CAMERON, J.A. The certificate of title to the lands in question, No. 160860, in the name of Thomas Richard O'Brien is expressed to be subject to such incumbrances, liens and interests as are notified by memorandum underwritten or indorsed thereon, viz.: A mortgage to Thomas Fish for $3,000 and two caveats, one registered May 21, 1910, by Thomas Richard O'Brien and the other, registered May 31, 1910, by George Anthony Pearson.

In the case of an application to bring lands under the Real Property Act, any person claiming an estate or interest therein may file a caveat forbidding such being done, and the District Registrar shall not bring the lands under the new system until such caveat shall have been disposed of (sections 127 and 128). Such caveat shall, however, lapse unless steps are taken within one month to establish the right set out in the caveat, (sec. 129).

In the case of lands under the new system any person claiming an estate or interest therein may file a caveat forbidding the registration of any person as transferee or owner, or of any instrument affecting such estate or interest, or unless such instrument be expressed to be sub-

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ject to the claim of the caveator. (sec. 130). By section 131 provision is made for notice to the caveator to take proceedings on his caveat and for the determination of the caveat on default of proceedings, or, in the event of the caveator appearing, then for such order by the Court as may be directed. And by section 132 it is provided that so long as the caveat remains in force the District Registrar shall not register any instrument purporting to transfer, mortgage or incumber the land "unless such instrument be expressed to be subject to the claim of the caveator."

It is contended on behalf of Pearson that, the transfer of the lands in question from Douglas to O'Brien and the certificate of title thereto in the name of O'Brien being expressly subject to the caveat of Pearson, O'Brien cannot now dispute the validity of Pearson's claim. It is argued that, the caveat having been filed, it was open to O'Brien to adopt one of two courses. In the first place he could have decided to contest the claim set forth in the caveat, and take proceedings for its removal under section 131, and other provisions of the Act. Or, on the other hand, he could accept the transfer and the certificate subject to Pearson's claim set out in his caveat. The former course he did not follow. The latter he deliberately adopted, so that he is now, by his own acts, precluded from contesting Pearson's claim.

In this view each certificate forms a fresh root of title and its terms are absolute. The policy of the Act is that all caveats should be disposed of at the time of the issue of the certificate. If the land be not already under the Act the certificate cannot be issued until the caveat is out of the way. If the land be under the Act, then either the caveat must be disposed of or the certificate issued recognizing the claim set forth in the caveat. The policy of the Act provides for registration of title and not of instruments, and intends that conflicting claims shall be

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disposed of on the granting of each successive certificate, either by being put an end to or by being recognized as valid.

Under the Provisions of our Real Property Act, as originally passed in 1885, any person claiming to be interested in any land might lodge a caveat "to the effect that no disposition of such land be made either absolutely or in such manner and to such extent only as in such caveat may be expressed, or until notice shall have been served on the caveator, or unless the instrument of disposition be expressed to be subject to the claim of the caveator, as may be required in such caveat, or to any lawful conditions expressed therein": sec. 107, and, by sub-section (3) thereof, "So long as any caveat remains in force prohibiting the transfer or other dealing with any land, the Registrar General shall not enter in the register book any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the land in respect to which such caveat is lodged." There was thus no distinction drawn in the original Act between the caveats filed before and after lands were brought under the system. In both cases the prohibition was absolute and the lands could not be dealt with by the Registrar until the caveat had been disposed of.

Evidently objections were found to these provisions, as the sections were repealed in 1887, cap. 11, 50 Vic., and certain sections substituted therefor and the substituted sections were amended in 1888, cap. 22, sec. 13, by adding, "unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat," to sub-section 9 of section 107 of cap. 11; and the sections as then substituted as so amended are to be found substantially in the consolidating Act of 1889, cap. 16, 52 Vic., section 130, where the distinction now existing between the effect of caveats filed in respect of lands to be brought under, and the effect of caveats in respect of lands

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already under, the new system appears. In the former case the registrar was absolutely prohibited from bringing the lands under the new system until and unless the caveat had been disposed of. These provisions are now to be found in sections 127, 128 and 129 of the present Act. In the other case, where the lands are already subject to the new system, the provisions made in the Act of 1886 and in the consolidating Act of 1889 were, in substance, the same as those now to be found in sections 130, 131 and 132 of the present Act.

Since the amendment in 1888 above referred to, it has been the practice to accept transfers and issue and accept certificates subject to the claims set out in caveats therein referred to without any idea being entertained that the transferees or holders were thereby recognizing as valid the claims alleged in such caveats. By the legislation expressed in the amendment of 1888 the policy of the law was assumed to be that, in the case of lands under the new system, caveats might be filed for the purpose of giving notice of claims the merits of which should be thereafter investigated and decided and that, until they were disposed of, certificates and instruments might be issued subject to such investigation and ultimate decision. Until now it has not been contended that the acceptance of an instrument under the Act, expressed to be subject to a claim on a caveat, placed the caveator in any stronger or better position than he was before its issue.

It was held by the Court *in banc* in *Alexander* v. *Gesman,* 4 Sask. 111, that a caveat under the Land Titles Act of Saskatchewan was "more than a notice." But the decision in that case does not go to the extent we are asked to go here.

"A caveat is not to be regarded as notice to all the world—actual registration is notice to all the world—but only as a means of conveying notice and as a statutory injunction against dealing with the property": *Hogg,*

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Australian Torrens System, p. 886. "A caveat is worthless unless there is in existence, at the time of its entry on the register, an enforceable right of some kind relating to the land:" *Ib.* p. 1040. The lodging of a caveat against registration of any transfer of land under the Act only throws a cloud upon the title of the registered proprietor, which it is the duty of the vendor, as between himself and a purchaser, to have removed: *Taylor* v. *Land Mortgage Bank*, 12 Vict. L.R. 748.

According to the Victorian Statute, section 144, *Hogg*, p. 543, a caveat may forbid the registration of any person as transferee or any instrument, either absolutely or until after notice to the caveator, "or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat." And, by section 146, "So long as any caveat shall remain in force prohibiting any registration or dealing, the Registrar shall not enter in the register book any change in the proprietorship of, or any transfer or other instrument purporting to transfer or otherwise deal with or affect, the estate or interest in respect to which such caveat may be lodged." The provisions of the Western Australian Act are similar: *Ib.* 632, 633. In the other Australian colonies there does not appear to be provision for the issue of certificates or instruments subject to the claim set out in a caveat.

So far as I can gather from Mr. Hogg's work, no case has arisen under the statutes of Victoria regarding the effect of the issue of a certificate subject to a caveat. In the other jurisdictions the case could not arise at all as the Registrar is absolutely prohibited from dealing with the title so long as the caveat remains in force, as was our law under the original Act of 1885, until amended in 1888.

In the case of *Taylor* v. *Land Mortgage Bank, supra*, the action was brought by a purchaser against the holders of certificates of title to lands against which a caveat had

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been lodged, and the real question there was to determine whose duty it was to have the caveat removed, and it was held that the existence of the caveat was not such evidence as to want of title as to refuse relief.

The term "caution" is used in the Land Transfer Act, 1875, sections 13-59. "A caution is a mere temporary suspension of the right of the proprietor to deal with the property registered in his name and has no other direct effect—either in the nature of the interest put forward by the cautioner or in restricting the property rights of the proprietor": *Hogg, Ownership & Encumbrance,* p. 231.

We were pressed with the judgment of the late Chief Justice Killam in *Re Moore and Confederation Life,* 9 M.R. 453. There it was held that the district registrar had found in the registered owner a power inconsistent with two of the incumbrances named in the certificate. It was not shown that Mrs. Moore had, as executrix, any power inconsistent with her interest as devisee so as to make the proposed transfer override the incumbrances against her as devisee. The term executrix is descriptive and does not show her power. Had the will been set out in the certificate there would apparently have been no question. But the statement of the Court that the Act makes the certificate of title final at each stage must, it seems to me, be construed with the whole statute in view. And here we have a provision of the Act permitting the issue of a certificate subject to whatever claims may be set forth in a caveat. In my opinion it would be going too far to say that the policy of finality of a certificate demands that we must read those words as converting a doubtful and perhaps worthless claim into one which the registered owner is not at liberty to question.

I have given the best consideration in my power to the wording of section 132. The contention practically is that this section should be construed as if the concluding

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words read "unless such instrument be and be expressed to be subject to the claims of the caveator, whether that claim is capable of being established or not." Surely, had that been the intention of the Legislature, care would have been given to give it clearer expression in words. If, on the other hand, the intention of the Legislature was to facilitate the registration of instruments and the issue of certificates and at the same time to make provision for the preservation of the rights and interests of parties who may have claims against the lands, by virtue of unregistered instruments or otherwise, until such claims should be ultimately disposed of, then it seems to me the language used is apt and clear and in my opinion the Legislature had no other object in view. The word "expressed" as used in both sections 130 and 132 and in reference to this discussion is a significant term. The caveator has no objection to registration provided it is "expressed" to be subject to his claim set out in the caveat, that is, provided that it is made absolutely clear to all parties interested in the title to the lands that the registration does not affect his claim which, thereafter as before, he remains at liberty to establish or defend according to the nature of the proceedings which may be taken.

Upon consideration I am of opinion that the provisions of the Act in question are not open to the restricted construction for which counsel contends, and that O'Brien's position has not been altered or affected by the memoranda on the transfer and certificate.

Was there in this case an agreement actually concluded between Pearson and Douglas? If there was no completed contract, then Pearson must fail. Obviously, if there is no concluded contract, if there have been negotiations never crystallized into a contract, then there can be no evidence of a contract within the Statute of Frauds. It was on this ground *Hussey* v. *Horne-Payne*, 4 A.C. 311, was decided in the House of Lords. Lord Cairns exam-

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ined the whole correspondence to find if it evidenced a complete contract and found that, although two of the letters taken by themselves and separately from the others might lead the reader to think they amounted to a concluded agreement, yet "there was in point of fact no completed agreement between the parties": p. 321. Mr. Justice Kay in *Bristol, &c.* v. *Maggs,* 44 Ch. D. at p. 623, sets forth his understanding of the decision in *Hussey* v. *Horne-Payne.* "Both he (Lord Cairns) and Lord Selborne seem to me to lay down broadly that, where it is sought to make out a binding contract from correspondence, the whole of it, as well as the verbal communications at interviews, should be regarded, and it is not right to stop at one letter of the correspondence which, with what preceded, might constitute a sufficient agreement within the Statute of Frauds; whereas if the whole of the correspondence were considered * * it may clearly appear that these letters were, in truth, only part of an uncompleted negotiation." "The question is really one of fact," per North, J., in *Bellamy* v. *Debenham,* 45 Ch. D. 494. Pearson did not agree to the formal document submitted to him for execution by Douglas, but made an alteration in it. Douglas thereupon withdrew from the negotiations as he had a right to do and there was, to my mind, no contract. The minds of the parties had not in point of fact met.

I concur in the judgment of the Chief Justice of the King's Bench and think the appeals must be dismissed.

HOWELL, C.J.M., concurred.

Both appeals dismissed.

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IN THE COURT OF APPEAL.

LAFVENDAL V. NORTHERN FOUNDRY CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Negligence—Master and servant—Use of defective materials—Liability of master for defect in system, works and ways provided—Res ipsa loquitur.

In the course of his employment as a carpenter in the erection of a building for the defendants, the plaintiff had to walk along the top of one of a number of wooden joists 20 feet long, 10 inches wide and 6 inches thick, fixed in a position 25 feet from the ground, the six inch surface being uppermost. When the plaintiff reached the centre of this joist, it broke across the broad surface in a diagonal splinter about 6 feet long, and the plaintiff fell to the ground receiving serious and permanent injury.

As the joists were delivered at the building, they were inspected by the foreman whom the trial Judge found to be an experienced, competent, careful and efficient man. He had rejected quite a number of them for different reasons and the trial Judge found that, although he did not submit them to any test, or even to a careful visual examination, his examination was sufficient to ascertain whether they were straight and of the proper length or had any other defects apparent to a person standing by and looking at them as they were being handled. They had also to pass through the hands of a number of other workmen before they were finally placed in position, but no one noticed the defect in that particular joist before the accident.

Held, that, under the circumstances set out, there was *prima facie* evidence of neglect on the part of the master to fulfil his duty at common law to provide fit and proper places for the workmen to work in and a fit and proper system and suitable materials under and with which to work, a duty which cannot be got rid of by delegating it to others; and that the defendants had not satisfied the onus thrown upon them of showing that they had exercised reasonable and due care in the inspection of the defective joist before it was placed in position.

Brooks v. Fakkema, (1911) 44 S.C.R. 412; *Ainslie* v. *McDougall*, (1909) 42 S.C.R. at 424; and *Smith* v. *Baker*, [1891] A.C. 325, followed.

Per Richards, J. A. It might fairly be held that the defendants had provided the joist in question as a part of their ways and system in connection with the plaintiff's work and, if so, there was a liability at common law and the defendants could not avail themselves of the fellow-servant line of defence.

Judgment for the plaintiff for $7000 damages.

DECIDED: 8th April, 1912.

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Statement.

In February, 1910, the defendants, a foundry company, were constructing a large building in the City of Winnipeg for their own purposes. To support the outside walls steel uprights 25 feet high were erected at intervals of 20 feet. From side to side and resting upon these steel uprights were placed "I" beams 20 inches in depth, from each side of which both at top and bottom projected flanges a shade over 3 inches wide. The width of the beams across these flanges was seven inches. The roof was to be supported upon 10 x 6 joists resting upon the "I" beams. These joists were placed upon the "I" beams at the outsides, but were raised on "corbels" in a graduating scale towards the centre of the building so as to give a pitch to the roof. The whole building consisted of eight of these 20 feet spans.

At the time of the accident the joists had been placed and the roof put on the first and part of the second span. Along each side of the building extending the whole length was a lean-to, and above the lean-to and beneath the eaves of the main building there were spaces for rows of windows. The only means provided for workmen to reach the roof was a ladder from the inside of the main building to the top of the lean-to at the end of the building where the roof was completed. From the top of the lean-to they got to the main roof and thence went to the place where work was to be done.

The defendants had employed one Toye to take charge of the work for them, purchase the material, employ the men and generally superintend and manage the work of construction. Toye was an experienced, competent, careful and efficient man.

The joists were sawn at a lumber mill in Winnipeg out of timbers 12 x 12, and were so cut that one 6 in. side and one 10 in. side was fresh cut. Toye stated that he usually stood by and saw the timbers as they were delivered; that he believed he saw all as they

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were unloaded, but certainly before they reached the roof; that it was his duty to do so; that he rejected 15 or 20 because they were too short, four because they were not straight, and one because it was otherwise defective. He did not inspect the timbers closely or subject them to any other test as to strength or soundness, but his examination seemed sufficient to ascertain whether they were straight and of the proper length, or had any other faults apparent to a person standing by and looking at them as they were being handled.

When some of the joists were delivered it was snowing and there was some snow and ice upon them, but whether or not that was so of those delivered on the day prior to the accident did not appear. Upon arrival they were lifted from the sleigh by two men named Ford and Peppiatt, and by being handled the snow was shaken off. It was the duty of these men to unload the joists from the sleigh and saw them to the proper lengths, and this they did. Each joist was then carried by three or four men to a hoist and elevated on to the "I" beams. The foreman in charge of this part of the work was a man named Clawson. Each beam was caught in the middle by the hoist and thus lifted to position. Clawson was above and let the joists down on their flat side on the top of the "I" beams, one end resting on each. He then walked on the flat side of the joist to the middle, unfastened the hooks by which they were elevated and waited for another to come up. The same process was gone through with each joist until the proper number were placed. The joists for the third span were brought from the mill, sawn to the proper length and hoisted on to the "I" beams on the 23rd February.

On the morning of the next day the plaintiff and another man were directed by Toye to go on the roof and adjust the joists upon the corbels on the top of the "I" beams. They went up the ladder before described

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to the roof of the lean-to, thence on to the roof of the main building and walked over it to the second span. where they completed placing the joists, and proceeded to the third span. The mode of operation was to stand on the lower flanges of the "I" beams with one foot on each side, move the joists that had been previously placed there by Clawson to the proper position, turn them up on to their narrow side, place the proper corbel between the "I" beam and the joist and nail the corbel to the joist. They had been working upon the third span about two hours when the whistle blew for dinner. The joist they were then working upon had just been turned over on to its narrow surface and lifted on to the corbel and moved to its proper place; the plaintiff had commenced to nail the joist to the block when the whistle for dinner sounded. He was then on the "I" beam remote from the finished roof. He completed driving the nail and began to walk across this last joist towards the finished portion of the roof, a distance of 20 feet away, in order to reach the ladder and descend from the building. When at the centre of this joist it broke across the broad surface in a diagonal splinter about 6 ft. long, and the plaintiff fell to the ground, a distance of 25 ft. He fell with his back across some frozen material and his spine was fractured. His injuries were of the most serious and permanent character. He was completely paralyzed from about the region of the hip joints downward, so completely that he had no control over the ordinary functions of the body. The upper part of his body, though probably not so strong as formerly, was not otherwise affected, and he had the use of his hands and head. He was a young man 28 years of age, unmarried and a skilled carpenter by trade. Before the accident he was a strong, healthy man.

This action was brought for damages, claim being

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made both at Common Law and under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178.

The action was tried before Mathers, C.J. K.B., who dismissed same.

Plaintiff appealed.

M. G. Macneil and *B. L. Deacon* for plaintiff, appellant, cited *Butler* v. *Fife,* [1912] A.C. 162; *Ainslie* v. *McDougall,* 42 S.C.R. 420; *Bartonshill Coal Co.* v. *McGuire,* 3 McQueen, 311; *McArthur* v. *Dom. Cart. Co.,* [1905] A.C. 72; *Shawinigan* v. *Doucet,* 42 S.C.R. 281; *Young* v. *Hoffmann,* [1907] 2 K.B. 646; *Wilson* v. *Merry,* L.R. 1 Sc. & Div. 333; *Williams* v. *Birmingham,* [1899] 2 Q.B. 342; *Brooks* v. *Fakkema,* 44 S.C.R. 412; *Fralick* v. *G.T.R.,* 43 S.C.R. 494; *Lindsay* v. *Davidson,* 19 W.L.R. 433; *Anderson* v. *C.N.R.,* 1 W.W.R. 503, 45 S.C.R. 355, and *Wilkinson* v. *B. C. Elect. Ry. Co.,* 17 W.L.R. 482.

R. M. Dennistoun, K.C., and *K. R. M. Daly* for defendants, respondents, cited *Lodge Holes Colliery* v. *Wednesbury,* [1908] A.C. 326; *Beal* v. *Mich. Central,* 19 O.L.R. 506; *Cribb* v. *Kynoch,* [1907] 2 K.B. 548; *Ainslie* v. *McDougall,* 42 S.C.R. 420; *Brooks* v. *Fakkema,* 44 S.C.R. 415; *Richardson* v. *G. E. Ry.,* 1 C.P.D. 342, and *Ormond* v. *Holland,* E. B. & E. 102.

HOWELL, C.J.M. The facts are fully set out in the judgment appealed from.

The joist which broke was intended to be placed, and was placed, amongst others to span a distance of 20 feet from one iron beam to another up in the air 25 feet above ground. These timbers (6 inches by 10 inches) were placed with their greatest width vertical and about 3 feet from one another. It was intended that boards at right angles with the timbers should be placed upon them in part construction of the roof of the building. It was a part of the system of construction that men should walk upon these timbers while being placed and that

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HOWELL, C.J.M.

in the construction of the roof men should be upon them for many purposes. It was contemplated and expected that men should use the timber to walk upon as the plaintiff did at the time of the accident.

The fact that a beam of British Columbia fir 10 inches by 6 inches broke, when the weight of a single man was put upon it, shows that there was a serious defect in it, a defect which any reasonable test or even visual examination should have disclosed.

Applying the rule of *res ipsa loquitur* there was evidence of negligence, but the learned Chief Justice found that the very slight evidence of inspection given at the trial satisfied the onus which was thrown upon the defendants.

It seems to me that, when timbers are to be used to support a roof 25 feet from the ground and are to cover a span of 20 feet without support except at each end, it is not too much for workmen to expect that these timbers have first been tested by being stretched for that distance on the ground with no supports except at the ends and some reasonable weight put upon each. The defendants gave evidence that each timber was raised from the ground by a grab-hook around the centre and that this was a test, but this joist perhaps was caught just at the diagonal crack and was possibly strengthened by the clamp. They also gave evidence that the man operating the hoist stepped on the centre of each timber after it was placed on the iron beams; but, as I read the evidence, I gather that the timbers were all brought up at one place and then, by the plaintiff and a fellow workman, moved therefrom to their proper places, and perhaps the man piled several on each other. At all events, the timber when placed in its proper position broke when the plaintiff was properly using it as a means of egress. The evidence of Toye's inspection is to me of the most perfunctory kind and he

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does not pretend to have examined the timbers to find or test their strength.

The trial Judge drew conclusions from established facts but, with great deference, I would draw different conclusions. The defendants do not pretend that Toye, their foreman, was bound to do, or should do, more than he had done. Toye did not test the strength of these timbers, nor did the defendants employ any competent person to do this work.

I shall assume that the defendants intended the work to be done in the manner in which it was done, for by their evidence they do not pretend that any other system or methods of procedure should have been adopted. It is evident that the work which the plaintiff was called upon to perform was of a dangerous character, and I think the defendants were called upon to take all reasonable precautions for the safety of the workmen.

In *Brooks v. Fakkema,* 44 S.C.R. 412, the system of working was to have a movable engine for the purpose of breaking jams in a logging slide. There was an experienced foreman in charge who directed the changing of the position from time to time of this engine. It had been placed too near the slide apparently by direction of the foreman, and a log jumped the slide and injured the plaintiff. It was held that the operations carried on were dangerous and that the Company were liable at common law and could not be relieved by the employment of a competent foreman because they had failed to provide a safe and proper place in which the employee could do his work.

Sir Louis Davies, in *Ainslie* v. *McDougall,* 42 S.C.R. 424, uses the following language:

"In other words, I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable cannot be extended to

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cases arising out of neglect of the masters' primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others."

All the authorities on this subject are referred to in these two cases and need not be again discussed.

The defendants' plan of building was to have these timbers span a space of 20 feet at an elevation of 25 feet from the ground, expecting and intending to have men walk upon and work upon them, and made no provision for their strength being tested other than a casual examination by looking at them and I think they are therefore liable at common law.

I think they are liable at common law even if Toye had been instructed to test the strength of each piece and had neglected to do so, for they owed a duty to the plaintiff to provide a reasonably safe place on which to work and reasonably safe material in a work of such imminent danger.

As set forth in the judgment of the Chief Justice of the King's Bench the plaintiff is a human wreck beyond any hope of recovery.

The judgment must be set aside and a verdict entered for the plaintiff with costs of this appeal and of the trial. The damages are most difficult to assess, but after careful consideration they have been assessed at $7,000 and the judgment for the plaintiff will be for that amount with costs.

RICHARDS, J.A. The plaintiff was a workman in the employ of the defendants, his work consisting in the fixing in place of certain wooden joists which, at the height of about 25 feet from the ground, extended from one steel "I" beam to another, the "I" beams being 20 feet, or thereabouts, apart. The plain-

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tiff worked on the "I" beam furthest from the only place provided for getting up to the "I" beams from the ground below, so that, when work ceased at dinner time, he was compelled, for lack of other means, to walk across one of these joists to get to the place from which he could descend to the ground. These were 20 feet long and only sustained by a few inches, at each end, resting on the "I" beams, there being no other support under them. Their dimensions were 10 inches by 6 inches, the 6-inch surface being uppermost. They had been freshly sawn on one 6-inch side and on one 10-inch side.

While he was thus crossing to go to his dinner, the joist on which he was walking broke under the plaintiff, so that he fell to the ground and was very seriously injured for life. The break extended through about six feet of the length of the joist, and the evidence seems to me conclusive that it must have happened because of the grain of the wood crossing from the upper to the lower side in that distance.

There were no ladders provided for the workmen to get up and down by. I cannot see that there would have been any inconvenience, or serious expense, if two ladders had been provided, one at each "I" beam, so that workmen would not need to walk upon the joists. It is said, however, that a break of this kind was such an extremely unusual thing that the need to provide ladders could not be foreseen by a reasonable person.

It seems to me that, because of the non-providing of ladders, or other means of getting down without crossing the joists, the defendants necessarily invited the plaintiff to use a joist as a means of crossing from one "I" beam to the other, in order to get off the building when work ceased. That being the case, I think that they made whatever joist might be used for that purpose a part of their ways and system, and, in the present case,

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that part has turned out to be defective. If I am right in that the employers are liable for the result of that defect. It is true that they could not tell in advance what joist would be so used, but they must have known that some joist would. It seems to me, therefore, that, as to each joist which could be so used, the defendants owed to the plaintiff the same duty that they would have if they said to him: "This joist is the one which we have provided for you to use in crossing from one "I" beam to the other. It is part of our ways and system." I do not see how, in the absence of ladders or other means of descending, such a conclusion can be avoided.

If I am right in the above, the result is that the defendants are in the same position as if they had provided the joist in question as part of their ways.

I have no doubt whatever that, where the grain ran completely across the ten inches of depth of timber in six feet of its length, as it patently did in this case, that fact could have been seen by any one looking at it carefully, and, if it had been seen, it would be patent that it was not likely to be strong enough to carry the weight of a man crossing it, particularly when it would be strung over twenty feet with supports only at the ends, in which position its own weight between the ends would, in itself, be a serious load for so defective a timber to carry.

The defect being thus in what was in effect part of the system of the defendants in connection with this work, there is, I think, a liability at common law. I do not see how they could avail themselves of what is known as the fellow-servant line of defence, even if they showed, as they probably did, that Toye was a competent man to inspect timbers.

With every respect for the views of the learned trial Judge, I would allow the appeal.

CAMERON, J.A. The accident in this case was due to a defect in the joists which was not readily discernible

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by visual observation. Toye, the foreman, cannot say that he inspected this particular joist, but he believes he saw them all. The learned Chief Justice found that this examination was sufficient to ascertain whether they were straight and of proper length, or had any other faults apparent to a person standing by and looking at them as they were being handled. At the trial an amendment was asked setting up a further act of negligence in the lack of proper inspection by the defendants of the joists before they were used. This amendment the Chief Justice held he would have allowed had he deemed it necessary in the interests of the plaintiff. The action was dismissed at the trial for the reasons set out by the learned Chief Justice in his judgment.

The plaintiff moves to set aside the judgment on the ground that the defendants were negligent in not furnishing scaffolding or ladders to enable the plaintiff safely to reach the work assigned to him, and in not providing a reasonable system of inspection of the joists, when it was known to the defendants for what purposes they were to be used. In point of fact, the joists were not only for the purpose of sustaining the roof of the building, but were also used for the purpose of enabling the workmen, employed in the work in which the plaintiff was engaged, to go to and to come from this work. As the joists were twenty-five feet above the level of the ground, it is clear that a much greater degree of care with reference to their soundness and suitability would have to be taken than if they were to be used to support flooring one or two feet above the ground level.

Plaintiff's counsel urged that the inspection made in this case was really no inspection at all. When the timber was delivered at the building from the mill where it was sawn, Toye says he usually stood by when it was unloaded for the purpose of seeing that it was "all right." I extract from the evidence:

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"Q. Was there any examination made of that timber on arrival? A. Well, I looked over the timber as it was being unloaded myself. I didn't take the timber and put any applied pressure on it to see what it would stand. I didn't think it was necessary.

"Q. What did you do? A. I simply used my eyes."

The timber was then cut to the proper length, carried to the proper place, and caught by a grab hook and hoisted into place on the top of the "I" beams. Later in his evidence Toye gives an account of what he saw after the timber was broken. In the centre of the timber he found an old pitch pocket, which he says was not apparent from the outside, but this, he says, was not sufficient to cause the break.

Mr. Bruce, an architect, in answer to a hypothetical question stated in terms of the facts here, said that a defect of this kind would easily be seen before the timber was laid if there was a foreman in charge.

Peppiatt, one of the workmen whose duty it was to cut the timbers to their proper length, says there was no inspection; that as soon as the timbers were cut they were hoisted up "as fast as we could do it, and in fact faster than we could do it, the two of us," p. 32.

As between himself and his servants, the master is bound to exercise due care in selecting proper and competent persons for the work (whether as fellow workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work: *Pollock, Torts,* 102.

This statement is largely founded on Lord Chancellor Cairns' *dictum* in *Wilson* v. *Merry,* (1868) L.R. 1 Sc. & D. 326, at p. 333. "If they (the jury) were of opinion that the respondent exercised due care in selecting proper and competent persons for the work and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequences of the accident." It had been previously

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held (1861) by Lord Wensleydale that the master is bound "to provide machinery fit and proper for the work and to take care to have it superintended by himself or his workmen in a fit and proper manner": *Weems* v. *Mathieson*, 4 Macq. 227.

The master is not liable for the negligence of his superintendent, but he is bound to see that his works are suitable for the operations he carries on at them; and he cannot, by leaving the supervision of his works to his superintendent, escape liability: *Beven, Negligence,* 611. "If the appliances he supplies are not reasonably suitable, the neglect is the master's." That this was the law before *Smith* v. *Baker,* [1891] A.C. 332, may have been arguable, but is so no longer in view of the dictum of Lord Watson in that case that, "A master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used." The duty of the master to secure an efficient scheme and appliances is, therefore, indefeasible and incapable of being delegated.

"The doctrine is now regarded as axiomatic that the employer is bound to furnish adequate materials and means and resources suitable to accomplish the work: that is to say, all that is necessary to carry on the business, including premises reasonably safe for that purpose": *Labatt on Master and Servant,* at p. 46, where there is given a valuable list of epithets and phrases used by the courts to designate the obligatory quality of the instrumentalities which the master is to furnish.

I refer also to the cases of *Brooks* v. *Fakkema,* 44 S.C.R. 412, and *Ainslie* v. *McDougall,* 42 S.C.R. 424, where the master's duty to provide fit and proper places for the workmen to work in and suitable materials to work with, and the impossibility of his divesting himself

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of the responsibility thereby imposed on him, are clearly set forth.

I have read the judgment of the Chief Justice and agree with his reasoning and his conclusion that the appeal must be allowed.

PERDUE, J.A., concurred.

Appeal allowed.

[Appealed to the Supreme Court. Ed.]

IN THE COURT OF APPEAL.

McNERNEY v. FORRESTER.

Before HOWELL, C.J.M., RICHARDS and PERDUE, JJ.A.

Negligence—Fall of wall of damaged building—Liability of owner for damages caused by.

The owner of a damaged building whose walls are, to his knowledge, in danger of falling is bound to exercise the utmost diligence and cannot delegate to others, whether contractors, architects or engineers, the duty of taking effectual means of preventing the falling of the wall to the injury of persons occupying adjoining land or their property, and it is no excuse that he placed the matter in the hands of an architect or a building inspector upon whose skill he relied and that he, in good faith, acted upon their advice that the walls were not in danger of falling.

Jolliffe v. *Woodhouse*, (1894) 10 T.L.R. 553; *Valiquette* v. *Fraser*, (1907) 39 S.C.R. at p. 4; *Ainsworth* v. *Lakin*, (1902) 57 L.R.A. 132; *Hughes* v. *Percival*, (1883) 8 A.C. 445; *Attorney-General* v. *Heatley*, [1897] 1 Ch. 560; *Todd* v. *Flight*, (1860) 9 C.B. N.S. 377; *Tarry* v. *Ashton*, (1876) 1 Q.B.D. 314; *Bower* v. *Peate*, (1876) 1 Q.B.D. 321; *Dalton* v. *Angus*, (1881) 6 A.C. 740, and 3 *Halsbury*, p. 315, followed.

DECIDED: 8th April, 1912.

Statement

THE defendants became the owners of a six story brick building, the side walls of which were 120 feet long. Prior to their ownership a fire had, during severe winter weather, destroyed the three upper floors. This fire burned away practically all of the flooring of the two top stories and the greater part of that between the third and fourth stories. There remained, however, in the three upper stories many pieces of charred joists and

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other partly burned material. Much water was thrown on these upper stories during the fire, which water froze there owing to the severity of the weather. The ice thus formed, together with the charred pieces of joists and other materials embedded in it, made a bracing that helped to keep the walls in place. As soon as possible after the fire the then owner caused braces to be put in, which, with the bracing formed by the ice and other materials already there, were apparently sufficient to keep the walls from falling.

After the defendants bought the property the defendant Forrester, who acted for himself and his co-defendant through their architect, employed a contractor to remove the frozen debris, but did not employ him or any one to put in further braces, to take the place of the support thus removed. The contractor did clear out the upper three stories, leaving them with only the braces which had been put in by the first owner after the fire. The result was that the bracing left was insufficient. While in that condition a wind, not greater than might be expected at that time of year, arose and blew down large parts of the side walls. One of those walls fell on, and injured, the plaintiffs' property next adjoining.

Metcalfe, J., found that the bracing at the time of the fall was insufficient. He, however, found that the defendant had relied upon the architect and the City building inspector as to the sufficiency of the bracing that had been put in after the fire to safely maintain the walls, after the contractor had done his work, and held that, because of his so relying, he and his co-defendant were not liable for the damage resulting from the fall.

Plaintiffs appealed.

H. Phillipps and *W. K. Chandler* for plaintiffs, appellants, cited *Nordheimer* v. *Alexander,* 19 S.C.R. 248; *Valiquette* v. *Fraser,* 39 S.C.R. 1; *Bower* v. *Peate,* 1 Q.B.D. 321; *Earl* v. *Reid,* 21 O.L.R. 553; *Dalton* v.

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Angus, 6 A.C. 740; *Hughes* v. *Percival*, 8 A.C. 455; *Pickard* v. *Smith*, 10 C.B.N.S. 473; *Tarry* v. *Ashton*, 1 Q.B.D. 318, and *Mullen* v. *St. John*, 12 Sick. (N.Y.) 557.

J. E. O'Connor and *A. K. Dysart* for defendants, respondents, cited *Earl* v. *Reid*, 21 O.L.R. 552, commented on in 18 Am. & Eng. Ann. Cas. 5; *Schwartz* v. *Gilmore*, 45 Ill. 455; *Martin* v. *Dufalla*, 50 Ill. App. 371; *Olsen* v. *Meyer*, 64 N.W.R. 954; *McMullen* v. *New York*, 104 N.Y. App. Div. 337; 40 C.L.J. 529; 41 C.L.J. 658; *Hill* v. *Taylor*, 9 O.L.R. 643; *Rylands* v. *Fletcher*, L.R. 3 H.L. 333; *Roberts* v. *Mitchell*, 21 A.R. 433; *Landreville* v. *Gouin*, 6 O.R. 455; *Holliday* v. *Bussian*, 16 M.R. 437; *Campbell* v. *Cluff*, 9 O.W.R. 401; *Valiquette* v. *Fraser*, 9 O.L.R. 57, and *Madras Ry.* v. *Zemindar*, 30 L.T. 770.

HOWELL, C.J.M. In December, 1909, a fire destroyed in part a six-story brick building owned by one Sterling. The building was fifty feet by one hundred and twenty feet deep, running from Fort Street to a lane twenty feet wide. The plaintiffs occupied then, and until the walls fell, the land adjoining the south wall.

Mr. Smith was the architect who acted for Sterling in the construction of the building, and after the fire he was a witness on Sterling's behalf in an arbitration between him and the Insurance Company.

Shortly after the fire one Rogers, the City Building Inspector, whose duties are apparently to order down or remove walls that are dangerous, and who has had in this work fifteen years' experience, examined the walls and tells in the evidence the general state of the building. The roof was nearly all burnt off and had fallen in; a small portion of it, however, apparently in front, had fallen part way down and was resting on some posts and beams. All the sixth floor but a few feet in front had fallen. All the fifth floor except a few feet of charred

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flooring and joists in the rear and about fifteen to twenty feet in front had also fallen. The fourth floor had been burnt away in the middle—the extent of which is not shown clearly in the evidence—it had probably fallen in to the extent of one-half or one-third. The remaining floors were not injured by the fire.

Throughout the length of the building there extended two rows of wooden posts supporting two lines of wooden beams, thus dividing it lengthwise in about three equal divisions. Joists at right angles to these beams rested upon the latter, and the ends of these joists were anchored to the walls by iron fastenings, but the manner in which these were fastened together does not appear.

Although the joists and parts of floors which fell must have burnt through, yet these posts and beams were chiefly left standing, as shown by photographs put in at the trial, except some of those in the sixth floor; and these photographs of the ruin, taken before any removal work had been done, show that the weather at the time of the fire was very severe, as great masses of ice were hanging from the portion of the roof which had not wholly fallen and the beams and walls were covered largely with ice, formed evidently as the water fell upon it while the fire was being extinguished.

When the joists burned through, some of them merely dropped down on an incline with one end fastened in the wall and the other resting on the burnt debris and charred beams or on a floor below. The half burnt roof and floors fell below, and no doubt rested on the half-burnt contents of the building and on the posts and beams making, as shown by the photographs, a tangled ruin, and upon all this water was thrown, the fire extinguished and all was frozen in a solid mass.

The evidence shows that the debris was frozen solid up into the fifth story, and apparently one or more posts in the sixth story supported a fragment of the roof which

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seems covered with ice. Mr. Rogers, after the fire, thought the walls dangerous and notified Sterling that he must brace the walls, and he ordered the putting in of nine transverse timbers, each reaching across the building, five at about the top of the sixth story, just under the roof, and four just below the floor of the sixth story, or at the top of the fifth. The lower four timbers were supported and steadied by the posts and beams left standing at the top of the fifth story. The five upper ones, each 50 feet long, were not in any way supported or steadied, except at the ends by the north and south walls, and manifestly, as shown by a photograph, they had sagged as one would have expected. The south wall had buckled or "bulged" southward to a noticeable extent, and I gather from Rogers' evidence that these timbers were put in—fastened as they were by iron bolts through the walls to planks—for the particular purpose of holding the walls together. Rogers, who was called by the defendants, gave evidence on this subject, and it is so important that I shall quote a portion of the vast volume of it:

"Q. After the fire was extinguished what did you do with reference to the building? A. As soon as I could make an inspection of the walls, and satisfy myself as to their condition, I decided that they were dangerous, should a high wind occur, and I advised Mr. Sterling on the 11th that he must take steps to protect the walls.

* * *

Mr. Phillipps: What kind of an examination did you make? A. I viewed the walls from the inside and outside, and I could see that some bracing of the walls was necessary, as a high wind might do damage to surrounding property.

* * *

"A. The top of the wall was standing exposed from both sides and nothing to tie it in at all.

* * *

"His Lordship: You say that constituted the danger?

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A. The wind would have a full sweep at them, nothing to steady them at all.

"Mr. Phillipps: Nothing to steady them? A. No.

"Q. When you say the wind would have a full sweep at them—supposing there were no braces in there at all, did you think any wind that might be expected to come along would do damage to them? A. Was liable to.

"Q. Was liable to? A. Yes, certainly.

"Q. And that is something—or don't you think any ordinary wind would have been liable to result in damage? A. Yes. The idea of putting in the braces was to draw them in to the portions that were standing up against the wall, the fallen joists.

* * *

"Mr. Phillipps: You spoke of a solid mass? A. Yes.

"Q. You know the solid mass you are referring to, do you? A. Yes.

"Q. You have it now immediately present in your mind? A. Yes.

"Q. How long would that have continued to support or how long would that have continued to afford the protection to the building after the fire? A. As long as it remained frozen.

"Q. There is no doubt about that in your mind now? A. No.

"Q. That is all clear? A. Yes.

"Q. And it would have remained frozen longer than the outside walls? A. Yes.

"Q. Because the sun would not have come in? A. Any portion of it where the sun could come in at the back, and get to it, it would thaw faster in there than it would on the outside wall.

"His Lordship: By 'the solid mass' you mean what? A. I mean furniture, beams, joists, charred cinders, that had been left there, or debris is what I call it, and what portion of burned wood work that they could shovel out of the building.

"Q. By the solid mass you evidently mean floors, and everything in the building? A. Yes, everything in there. The water poured in there on it, and it was frozen almost before it would strike it, and the spray, from where the stream would strike, rolling off and freezing and freezing, and making just one solid mass of the whole thing.

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"Q. And there is no doubt that that would afford less support when it became thawed than what it afforded when frozen? A. Yes, to a degree; the joists burned off at the centre of the beams, the fire being at the centre of the building; when they would burn off they would drop down and form a brace against the outer walls, of course, as I have explained."

On the 10th of March the defendants became the owners of this property, having previously for some time been fully aware of its state and condition. They at once employed Mr. Smith as their architect, and authorized him to commence the work of rebuilding and the defendants, with Smith, employed one Finkelstein to remove the half-burnt rubbish and half burnt furniture, the contents of the building, together with the ice and snow. The latter with a gang of men, after about two weeks' work, on March 22nd, had the most of this removed, and on that day his workmen became greatly alarmed by some falling bricks and swaying of the walls and ran from the building. The defendant Forrester was sent for and he, on the evening of that day, sent for both Rogers and Smith. The next day both these men apparently examined the building. Rogers swears he thought the walls then were still strong enough although he knew the weather was then much warmer and the debris was removed. To me, on this subject, his evidence is not satisfactory. Smith, the adviser of Forrester in all these matters, although present at the trial, was, for some reason, not called. He of all others knew of the state of the walls, for he directed Finkelstein from time to time as to the material which should be removed, and he gave evidence before the arbitration as to the loss by the fire. Forrester swears that both Rogers and Smith told him on that day that the walls were strong enough as they were then braced, although the ice and debris had been removed. The next day the walls fell and the plaintiffs' building, the subject matter of this suit, adjoining the south wall was crushed.

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At the time of the falling of the walls the wind was blowing at the rate of 36 miles per hour from the north-west, and Rogers swears that this wind caused the walls to fall.

It was shown by the evidence that on the 6th of March, while the interior frozen mass was firm, a wind of 56 miles per hour from the same direction was blowing and the walls remained firm, and it was also shown by the evidence that for a few days before the accident the weather had turned warm, but from my own experience for 33 years I think this should not be unexpected.

It appears then that the original braces directed by Rogers were considered sufficient, with the assistance of the frozen interior mass, that on the 6th of March this was sufficient against a very high wind, that shortly thereafter the frozen interior mass was removed by the defendants, and that on the 24th of March, with a wind, much less forceful, the walls fell. The learned trial Judge in his reasons for judgment says: "I think Mr. Rogers and Mr. Smith were mistaken when shortly before the accident they told Mr. Forrester that the walls were safe. I think that, considering the temperature and the removal of the debris, some further precautions should have been taken so as to counteract the effect of the removal of the ice and debris." The learned Judge however, found a verdict for the defendants.

It seems to me that the irresistible conclusion to be drawn is that the walls were greatly weakened by the debris having been removed, and that some one was negligent. Rogers never spoke to the defendants respecting these walls until the 22nd or 23rd of March, after the debris was removed. Forrester has sworn to what Mr. Smith said, but the latter has not pledged his oath as to his opinion, or what he advised, and we do not know what his real views were.

The walls upon the defendants' property were danger-

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ous and a menace, and were a nuisance to the adjoining property holders; and, although the work of restoration was in itself lawful, injury to the adjoining property might be expected unless certain precautions were taken. But the defendants claim that, having acted upon the advice of Rogers and Smith, they are not liable. It will be at once apparent that Forrester did not act upon the opinion of Rogers, for he did not consult the latter until after the ice and debris had been removed; and, as the walls fell early the next morning after he spoke to Rogers, he would have had little time to act if action had been directed. The only advice he took was that of Smith, a person employed by him; and, as we do not know what this architect's real views or intentions were, I should presume strongly against the defendant because of his not calling him as a witness, and I think I am supported in this position by *Baker* v. *Furlong,* [1891], 2 Ch. at 184.

It seems to me that the sole question of law is, can the defendants shield themselves behind the advice given them as Forrester swears by the architect Smith?

The case of *Jolliffe* v. *Woodhouse,* 10 T.L.R. 553, was an action between adjoining owners, and in it Lord Justice Lindley held that the duty owed to an adjoining owner could not be delegated to a builder or architect and thus free the defendant from liability. Sir Louis Davies, in *Valiquette* v. *Fraser,* 39 S.C.R. 4, held that the opinion or advice of an architect was no more protection than the employment of an independent contractor. In 3 Halsbury's Laws of England, 315, after discussing the duties of an employer where, if care is not taken, mischief will follow, the author says: "and he cannot divest himself of this duty by employing some other persons (whether contractor, architect or engineer) to do what is necessary to prevent mischief or by stipulating that such other person shall take precautions against it."

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The law on the subject matter of this suit in the State of Massachusetts is fully set forth in *Ainsworth* v. *Lakin*, 57 L.R.A. 132, and the authorities are all considered. It is there held that where walls are dangerous after a fire the owner cannot, as against an adjoining owner, shield himself behind an independent contractor, and that he cannot avoid liability by delegating that duty to another.

The duty which an owner owes to an adjoining occupant is also set forth in *Hughes* v. *Percival*, 8 A.C. 443, and at page 445 Lord Fitzgerald says: "He cannot get rid of the responsibility thus cast on him by transferring that duty to another."

I cannot understand why the negligence of an architect or an engineer would shield the defendant when he cannot get that protection from the most skilful builder or contractor.

The walls fell because of the negligence of the defendant, or some one employed by him, and in my view of the law he is liable.

Common experience here tells us that such a wind as that which was blowing on the morning of the accident cannot be unexpected, and I can see no reason to call that, or the temperature then prevailing, as *vis major* against which the defendant was not bound to provide.

The judgment will be set aside and the case disposed of as set out in detail in the judgment of Mr. Justice Perdue.

RICHARDS, J. A. I do not see that the evidence, when analyzed, shows clearly that the inspector did give the advice on which the defendant Forrester says he relied. If given it was not till after the rubbish had been removed and the bracing thereby weakened. The fact that the architect, though in Court, was not called as a witness, casts a good deal of doubt on the statement that he advised the defendant that the course he took was a safe one. But assuming, for the moment, that they, or either of them,

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did so advise, I am, with deference, unable to agree with the learned trial Judge as to his conclusion of law. There are decisions to be found of courts in some of the United States, in which the view taken by him has been upheld, but I do not think that it is the law of England or of this Province.

It has been suggested that the rule of law on which *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, was decided, applies to this case. It seems to me that, if I had to consider that point, I should hold that it does not. But, in the view I take of the facts, it is not necessary to decide that question here. The rule which does apply is, in my opinion, well stated in a decision of the Supreme Judicial Court of Massachusetts, *Ainsworth* v. *Lakin*, reported in 57 L.R.A. I quote from page 135, (2nd column): "It was the duty of the defendant not to suffer such a wall to remain on his land, where its fall would injure his neighbour, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he would have no control, such as *vis major*, acts of public enemies, or wrongful acts of third persons, which human foresight could not reasonably be expected to anticipate and prevent."

In the present case it was apparent, I think, after the debris had been taken out, that the walls were not safely braced. If the defendants had employed the contractor, when taking out the frozen rubbish, and thereby weakening the bracing of the wall, to sufficiently replace such support with further bracing, and the contractor, though a competent one, had neglected to do so, and the injury which did happen had resulted therefrom, there is no doubt that the defendants would be liable. Their liability is the more apparent when they did not even arrange for anything to take the place of the support so removed. On what principle an owner of dangerous property, who could not protect himself from an action for damages

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because he had employed a capable contractor, should be protected because, instead of relying on a contractor, he relied on an architect or City inspector, I am unable to see. The principle seems to me the same in either case.

In *Jolliffe* v. *Woodhouse,* 10 T.L.R. 553, the Court of Appeal for England held that, where the defendant owed the plaintiff a duty to do certain rebuilding with reasonable despatch, it was no answer, to an action for breach of this duty, to prove that he had delegated the carrying out of it to an architect and builder.

In Vol. III of *Halsbury's Laws of England,* par. 670, it is said: "Where the nature of the contractor's employment is such that, though the work is in itself lawful, injury to the property of the neighboring owner may be expected to arise in the natural course of events, unless certain precautions are taken, then it is the duty of the employer to take care that those things are done which are necessary to prevent the mischief arising; and he cannot divest himself of this duty by employing some other person (whether contractor, architect, or engineer) to do what is necessary to prevent the mischief, or by stipulating that such person shall take precautions against it."

I cannot see that the advice of a City Building Inspector can be placed on any higher plane than that of an architect.

I think the plaintiffs are entitled to recover under the circumstances of this case.

As the learned trial Judge took no evidence of *quantum* of damages and as the parties have agreed to that question being referred to the Master, if we hold the defendants liable, there will be such a reference.

Costs and further directions to be reserved. The plaintiffs to have the costs of the appeal in any event of the cause.

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PERDUE, J.A. The plaintiffs were tenants of premises on the north east corner of Fort and Graham streets in the City of Winnipeg, in which they carried on their business of blacksmiths. The Sterling block, a large brick warehouse, adjoined their premises immediately on the north. This block was six stories in height and the side contiguous to the plaintiffs' premises was 120 feet in length. On 9th December, 1909, a fire took place in the block which greatly injured the upper portion of it, the interior of the fifth and sixth stories, together with the roof, being almost completely destroyed. The third floor, counting the ground floor as the first, appears to have remained intact, but there was a large hole burnt in the fourth floor through which the wreckage of the stories above fell and formed, with the water thrown upon it, a frozen mass extending almost to the sixth floor. The south wall, which adjoined the plaintiffs' premises, bulged outwards at the top.

The upper portions of the end walls were also injured and weakened by the effect of the fire and of the water thrown upon them.

Immediately after the fire, Mr. Rogers, the City Building Inspector, informed Mr. Sterling, the owner, of the dangerous condition of the walls. Accordingly, Sterling, under Rogers' direction and with his approval, had braces put in extending across the building from the north to the south wall. Four of these braces were placed near where the sixth floor had been and the remaining five were put in the sixth story near the top of the walls. The object of putting in these braces was to secure the walls from falling until repairs or reconstruction could take place.

On 6th March, 1910, the defendants purchased the land and the injured building as it stood, taking possession of it on 10th March. On 24th March the accident occurred which caused the injuries of which the plaintiffs

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complain. A considerable portion of the side walls of the building from the fourth floor upwards fell, the south wall falling outwards upon the plaintiffs' premises and doing serious damage.

There can be no doubt that after the fire the building was in a condition which endangered the plaintiffs' premises. The then owner, Sterling, instead of taking down the walls to a point where they would cease to be dangerous, endeavored to keep them in position by bracing them as above mentioned. After the building had remained in this condition for some three months, the defendants purchased it. Before buying it they made a personal examination of it and also had it examined by their architect, Mr. Smith. They therefore must be taken to have purchased the building with notice of its condition and, if the walls were in danger of falling, it became the defendants' duty as owners to protect the adjoining premises from injury: *Attorney General* v. *Heatley,* [1897] 1 Ch. 560.

The defendants place much reliance upon the approval by Rogers and Smith of the manner in which the walls were braced, and upon the opinion of these gentlemen that sufficient precautions had been taken to prevent an accident. We have not the benefit of Mr. Smith's evidence as to what his opinion was. The defendants did not call him as a witness, although it was alleged by counsel and not denied that he was present during the trial. Evidence of what he stated to the defendant Forrester was not admissible to prove the opinion of Smith as an expert. The building inspector, Rogers, is not an architect, but he has had some experience as a builder and much experience in judging of the strength of walls and the condition of buildings which have been injured by fire. He states that he made an inspection of the walls after the fire and considered them dangerous. He advised Sterling that the latter should take steps to

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protect the walls. In accordance with this advice and with Rogers' approval the braces were put in. Rogers expected that reconstruction work would soon be commenced and he did not anticipate that there would be such a long delay in making the repairs. It is clear that he approved of the system of bracing that was adopted only as a temporary expedient to keep the walls in position until the building could be repaired.

Considerable evidence of experts was put in by the plaintiffs to show that the braces were insufficient for the purpose for which they were intended. It is not necessary to discuss this evidence in detail. One fact of great importance was admitted by all the witnesses, including Rogers. The pile of debris in the centre of the building, consisting of charred timbers, furniture and other material, had been frozen into a solid mass by reason of the great quantity of water thrown into the building. Joists which had been burnt through in the interior part of the structure dropped down at one end, the other end remaining anchored or attached to the wall. The burnt ends of the joists became frozen in the interior mass and formed braces which helped to retain the walls in place. This frozen mass attached to the walls operated, in the opinion of all the witnesses who gave expert testimony, as a great source of strength to the structure. Rogers states that it would have a stiffening effect on the walls, that it "would clamp the walls together," that it "brought the whole thing together tight." He also stated that he took that element of strength into consideration when he considered the braces.

It is therefore evident that, if the interior mass of frozen material were removed, the structure would be deprived of a factor which largely contributed to its safety.

The defendants obtained possession of the building on 9th March, 1910, and shortly afterwards they let a

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contract, through their architect Smith, for the cleaning out of the building. The work of cleaning out proceeded under this contract and the interior mass of debris was removed. Some unburnt portions of floor were left and also the unburnt posts and the beams that extended lengthwise through the building and supported the ends of the joists. There appear to have been no beams running across the building and where the joists were burnt there was nothing except the braces at the top to hold in the side walls. The trial Judge seems to have been under the impression that there were "bond timbers" which helped to support the walls, but these bond timbers, as explained in the evidence, were simply pieces of timber built lengthwise into the walls between the courses of brick, upon which the ends of the joists rested. They were a part of the wall itself and did not act as braces.

The effect of the removal of the interior mass was made evident shortly before the accident occurred. During a moderately windy day the walls commenced to shake, a brick fell from a chimney and the men working in the building became alarmed and ran out. On the following day, the 23rd March, Smith, the architect, and Rogers examined the building and thought the walls were safe. On the next day, the 24th, during a moderately high wind the walls fell. The accident occurred after a day of very high temperature for that time of year, the maximum on the 23rd being 75 degrees and the minimum 44 degrees. The effect of the high temperature would be to thaw the ice from the walls and to remove any strength they might take from their frozen condition. As showing that the removal of the frozen mass from the interior of the building weakened the wall and contributed to the accident, evidence was given that on the 6th March, before any of the contents had been removed, the walls withstood a wind as high as 56 miles an hour from the north west, while the wind on the day of the

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accident was only 36 miles an hour from the same direction.

I think the proper conclusion to be drawn from the evidence, as to the sufficiency of the bracing, is that the braces might be expected to maintain the walls in position as long as the interior mass remained undisturbed and in its frozen condition, but that, as soon as any considerable portion of it was removed, something should have been supplied to take its place. Even if no part of the interior mass were removed, it was admitted by Rogers that there would be danger as soon as the temperature rose so as to cause a thaw.

Where the owner of land permits the walls or chimneys of the buildings erected upon it to get into a ruinous and dangerous condition and knowingly permits them so to remain until they fall upon and injure the house of an adjoining proprietor, he is liable for the damage caused: *Todd* v. *Flight,* 9 C.B.N.S. 377. There is the same liability under the laws of the Province of Quebec: *Nordheimer* v. *Alexander,* 19 S.C.R. 248. The duty of an owner is to keep his building in such a state that his neighbour may not be injured by its fall: *Chauntler* v. *Robinson,* 4 Ex. 163. The liability in such a case is clearly established if the owner knows his building is dangerous and fails to take steps to prevent it from falling, but difficulty arises in considering what degree of care, if any, will protect him in case an accident occurs and damage is caused to his neighbour.

The principle has been established by the case of *Rylands* v. *Fletcher,* L.R. 3 H.L. 330, that a person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is *prima facie* answerable for all the damage naturally resulting. In such case he can only excuse himself by showing that the escape was owing to the plain-

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tiff's default, or perhaps that the escape was the consequence of *vis major*: per Blackburn, J., in the Exchequer Chamber, L.R. 1 Ex. 279, and approved in the House of Lords. The position of the defendants in the present case differs from that dealt with in *Rylands* v. *Fletcher* in this respect, that they had been putting the land to its natural use and the erections only became dangerous by the happening of a fire. But after the walls became dangerous, and were known to be so by the owner of them, the liability in each case must, where injury takes place, be very similar.

An injured wall, which may from want of cohesion fall over at any time on the adjoining land, may reasonably be regarded as a thing having a tendency to escape within the rule laid down in *Rylands* v. *Fletcher*: see *Clerk & Lindsell on Torts,* Can. ed. 439. There can be very little difference in the responsibility which a man incurs by keeping a reservoir filled with water threatening his neighbours' land and the responsibility he incurs where he keeps a ruinous wall overhanging his neighbour's property. If he cannot escape liability in the first case by showing that he acted upon the best advice and took all reasonable care and precaution, can he in the second case evade responsibility by establishing a similar defence?

A person who keeps a lamp overhanging a public street is bound to maintain it in a safe state of repair, and this is a liability which he cannot get rid of by showing that he employed a competent person to put it in repair: *Tarry* v. *Ashton,* 1 Q.B.D. 314. The same responsibility would be incurred where the structure, without permission or right, overhung or threatened private land, in respect of an injury caused to the owner of the latter or to his property.

I think the present was a case where the owner of the damaged walls was bound to exercise the utmost

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diligence in protecting the plaintiffs from injury. Sterling, in the first place, and the defendants afterwards, knew of the condition of the walls. The south wall after the fire was in a very dangerous state and threatened the plaintiffs' premises. It was the duty of the owner of the wall to make it safe or to pull it down. If he allowed it to remain he was responsible for its safety.

The defendants urge that the walls had been sufficiently braced by Sterling's direction and that they were entitled to rely upon the opinion of Rogers, the building inspector, and Smith, the architect, that this had been sufficiently done and that the walls were safe. They, as purchasers from Sterling, are in the same position as he in regard to their duties and responsibilities to the plaintiffs. It was Sterling's duty to make the walls safe and that duty he could not delegate to Rogers or Smith or any other person so as to avoid responsibility himself: *Hughes* v. *Percival,* 8 A.C. 443; *Bower* v. *Peate.* 1 Q.B.D. 321, approved in *Dalton* v. *Angus,* 6 A.C. 740. The means taken or advised by Rogers and Smith were insufficient and there is no question of *vis major* in this case.

Apart from the proposition whether the defendants would discharge their duty by acting upon the advice of a competent architect, there is another phase of the case which bears strongly on the defendants' liability. The evidence shows that the system of bracing adopted was intended to be of a temporary character only. When giving his approval of what was done to hold the walls in place, Rogers relied upon the strength given to the structure by the interior frozen mass. Evidently it was not intended that the bracing would be sufficient without the frozen debris as an internal support, unless something were done to take its place upon its removal. It is clear that the precautions, which proved to be sufficient as long as the building remained in the same condition in

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which it was when the braces were first put in, completely failed when the contents of the building were removed and the ice thawed from the walls. If, therefore, it were admitted that Sterling had exercised due care and diligence in the precautions he took, the defendants, by removing the contents of the building and depriving the walls of an important factor contributing to their support, while nothing was done to take its place, not only failed to exercise reasonable care, but were guilty of an act of positive negligence.

The learned trial Judge found that the accident occurred by reason of the insufficiency of the bracing. He was also of opinion that some further precaution should have been taken to counteract the effect of the removal of the ice and debris. This is in effect a finding that due care was not taken to avert the fall of the walls and the resulting damage to the plaintiffs. The trial Judge, however, took the view that the owners, having in good faith acted upon the advice and assurance of the architect and the building inspector, and having done what they advised, had satisfied the duty owed to the plaintiffs. I think it may be regarded as settled law that where a man owes a duty to another he cannot delegate that duty and evade the responsibility of seeing that the duty was adequately performed. If the duty has not been performed, it is no excuse for the person who should have performed it to show that he had placed the matter in the hands of another upon whose skill he relied: *Jolliffe* v. *Woodhouse,* 10 T.L.R. 553; *Bower v. Peate, supra; Hughes* v. *Percival, supra; Valiquette* v. *Fraser,* 39 S.C.R. p. 4; *Ainsworth v. Lakin,* 57 L.R.A. 132.

I think the appeal should be allowed with costs, the judgment in favour of the defendant set aside and judgment entered for the plaintiffs with costs on the King's Bench scale. As it was agreed between the parties that if damages were awarded the amount thereof

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should be found by the Master, there should be a reference for that purpose; further directions and the question of the costs of the reference will be reserved to be dealt with by a Judge of the Court of King's Bench.

IN THE COURT OF APPEAL.

EDDLES v. SCHOOL DISTRICT OF WINNIPEG NO. 1.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Workmen's Compensation Act, 1910—*Injury arising out of and in the course of the employment—Death resulting from the injury.*

The deceased was a workman in the employ of the defendants. He lived across the street from the school where he worked. Part of his work was to feed furnaces with sticks of cordwood. In the morning of the day of his injury his wife saw him go from his house to the school in his usual good health. Later in the morning she saw him come out and return home. As he came out she noticed that he walked as if in pain and held his hand against his body. It was found that he was suffering from a fresh rupture or hernia.

Held, that there was sufficient evidence, apart from the statements of the deceased to his wife and the doctor, to show that the injury arose "out of and in the course of the employment," within the meaning of the Workmen's Compensation Act, 1910.

Mitchell v. *Glamorgan Coal Co.*, (1907) 23 Times L.R. 588, followed.

The physician who attended the deceased discovered that the deceased had an old hernia on the side opposite to the fresh one and advised him to be operated on for both at the same time. The deceased consented and the double operation was performed with apparent success; but, within 48 hours after, a virulent form of blood poisoning developed in both wounds causing his death a few days later.

There was nothing to show that the blood poisoning was caused exclusively by the operation for the cure of the old hernia.

The County Court Judge awarded the plaintiffs under the Act $1500 compensation for the death.

Held, that this award involved a finding that the infection got into the deceased through the wound caused by the operation for the new hernia, that there was evidence to justify such finding and the further finding that the death had resulted from the fresh hernia.

Dunham v. *Clare*, [1902] 2 K.B. 292, and *Ystradowen* v. *Griffiths*, [1909] 2 K.B. 533, followed.

Appeal dismissed and award sustained.

DECIDED: 29th April, 1912.

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Statement.

In an application for arbitration under the provisions of The Workmen's Compensation Act, 1910, it was alleged that William Henry Eddles, a workman employed by School District No. 1, Winnipeg, on November 23, 1911, sustained an injury arising out of and in the course of his employment and that on December 1, 1911, the death of the said Eddles resulted from the injury. It was further alleged that the deceased while stoking a furnace sustained a strain causing a hernia. When aid was called it was discovered that he had previously sustained a rupture on the other, the left, side. The surgeon in attendance advised an operation and suggested to Eddles that in regard to the left side he could have that operated on also, leaving it wholly with Eddles to decide. Eddles adopted the suggestion and both operations were performed. Subsequently blood poisoning supervened and the unfortunate man died.

The County Court Judge, to whom the matter was submitted under the Act, gave his award in favor of the applicants for $1,500. The matter came before the Court by way of appeal from, and to set aside, the award upon the grounds (1) that there was no evidence that the deceased sustained an injury arising out of and in the course of his employment, and (2) that, if the deceased sustained an injury arising out of and in the course of his employment, there was no evidence that such injury was the cause of his death.

R. M. Dennistoun, K.C., for appellants cited *Mitchell* v. *Glamorgan*, 23 T.L.R. 588; *Pomfret* v. *Lancashire*, [1903] 2 K.B. 721; *Brintons* v. *Turvey*, [1905] A.C. 230; *Connacher* v. *Toronto*, 21 C.L.T. Occ. N. 172; *Clover* v. *Hughes*, [1910] A.C. 249; *Barnabas* v. *Bersham Colliery*, 103 L.T. 513; *Hawkins* v. *Powells*, [1911] 1 K.B. 988; *Dunham* v. *Clare*, [1902] 2 K.B. 292; *Gilbey* v. *G.W.R.*, 102 L.T. 202, and *Reg.* v. *Gloster*, 16 Cox's C.C. 471.

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Argument.

J. Auld for plaintiff, respondent, cited *Smith* v. *Baker,* [1891] A.C. 345; *Smith* v. *Lancashire,* [1899] 1 Q.B. 141; *Kenny* v. *Harrison,* [1902] 2 K.B. 168; *Evans* v. *Astley,* 80 L.J.K.B. 1177; *Hawkins* v. *Powells,* [1911] 1 K.B. 988; *Simmons* v. *White,* [1899] 1 Q.B. 1005; *Mitchell v. Glamorgan,* 23 T.L.R. 588; *Wright* v. *Kerrigan,* [1911] 2 Ir. R. 301; *Pomfret* v. *Lancashire,* [1903] 2 K.B. 721; *Lovelady* v. *Berrie,* Beverley's Digest, p. 22; *Grant* v. *S.W.R., Id.* 23-4.; *Walker* v. *Mullins, Id.* 29; *Johnson* v. *Marshall,* [1906] A.C. 409; *Averson* v. *Lord Kinnaird,* 6 East, 188; *Armstrong* v. *Can. Atl. Ry.,* 2 O.L.R. 219; *Rex* v. *Foster,* 6 C. & P. 325; *Rex* v. *Gilbert,* 38 S.C.R. 284; *Gilbey* v. *G.W.R.,* 102 L.T. 202; *Amys* v. *Barton,* 81 L.J.K.B. 65; *Dunham* v. *Clare,* [1902] 2 K.B. 292; *Ystradowen* v. *Griffiths,* [1909] 2 K.B. 533, and *Shirt* v. *Calico Printers,* [1909] 2 K.B. 51.

RICHARDS, J.A. Compensation is claimed under The Workmen's Compensation Act, 1910, by the widow and child of William Henry Eddles.

Eddles was in the Board's service. He lived across the street from the school where he worked. It was his duty to lift, carry and throw sticks of cordwood into furnaces.

On the day of his injury his wife saw him go from his house to the school building in his usual good health. Later in the morning she saw him come out of that building and return to their house. As he came out she noticed that he walked as if suffering pain and held his hand against his body. It was found that he was suffering from a fresh rupture, or hernia. By his physician's advice he went to a hospital to undergo an operation to cure the hernia.

When he was about to be operated on, the surgeon discovered that Eddles had an old hernia, on the opposite side from the new one, and advised him to be operated

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on for it at the same time as the operation was to be had for the new one. Eddles consented, and the double operation was had.

Within a day or two after the operation a virulent form of blood poisoning was found in both wounds. It caused his death a few days later.

Medical evidence showed that hernia was an injury very likely to result from such work, in handling cord-wood, as Eddles' duties in the Board's service required of him.

It was impossible to show, with certainty, in which of the wounds, caused by the double operation, the blood poisoning originated. The surgeon who operated thought it probably began in both at the same time. Apparently death would have resulted whether it began in both wounds simultaneously or in one of them.

Evidence was allowed of what Eddles had stated to his family doctor, as to the cause of the new hernia.

The learned County Court Judge found the Board liable and assessed damages. It is argued on behalf of the Board that the Judge misdirected himself in allowing the hearsay evidence of what Eddles had stated to his doctor. It seems to me that the unquestionably admissible evidence, other than hearsay, of the facts which are stated above, was amply sufficient to justify the finding that the new hernia was a personal injury by accident arising out of and in the course of the employment. He went to the school building without the hernia. He emerged later with it, and the evidence showed that his work was such as was specially likely to be the cause of hernia: *Mitchell* v. *Glamorgan Coal Co.*, 23 T.L.R. 588.

That the blood poisoning and Eddles' death would be properly held to be the result of the injury if there had been only the operation for the new hernia, with the blood poisoning and death following it, is, I think, shown

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by the decision of the English Court of Appeal in *Dunham* v. *Clare,* [1902] 2 K.B. 292.

The difficulty in this case arises from there being two operations, one for a hernia suffered by Eddles while in the Board's employment, the other for an old hernia, not shown to have been in any way caused by his work in that employment, and from the doubt as to which wound admitted the virulent germs which caused the death.

The argument that the operation for the old hernia resulted from the injury, because of the surgeon discovering it, and advising that operation, as a result of examining Eddles with a view to operating for the new hernia, does not appeal to me as sound. It is true that it was a similar operation to that resulting from the new injury, and one apparently very properly made under the circumstances. But, if it is to be held to be an operation resulting from the injury received by Eddles in his employment, then any kind of operation which the surgeon might then have discovered the need of, no matter from what cause arising, would equally be one so resulting.

To illustrate. Suppose that the surgeon had found that Eddles was suffering from cataract, and threatened with blindness, and had advised, and, with Eddles' consent, carried out, an operation to remove the cataract, performing the operation at once after that for the new hernia. If blindness had resulted from unskilfulness in the eye operation, or any other injury had in any way resulted therefrom, would it be possible to hold such blindness, or other injury, as resulting from the injury causing the new hernia, because, if it had not been for the latter, the need for the eye operation would not have been seen by the surgeon, and he would not have made it?

I have assumed, for the purpose of the above illustration, that an operation for hernia and one for cataract could be performed on the same person on the same

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day. Whether I am right in this or not does not interfere with the use of it as a hypothetical illustration to show what seems to me the unreasonableness of the argument I am dealing with.

In *Pomfret* v. *Lancashire,* [1903] 2 K.B. 718, and in *Barnabas* v. *Bersham,* 103 L.T. 513, it was held that there is no liability where the injury is as likely to have happened from something arising outside of the employment as from the employment. Those cases make me hesitate as to the finding that should have been made here. But the wounds were, from the very nature of the troubles, close to each other. The microbe that caused the death was a very virulent one, that would have caused death if it got into either wound. And, if it was where it would have got into either, it seems more than likely that it would have got into the other if that other had been the only wound. The surgeon's opinion was that it started in the two wounds at the same time. I think that, if a jury had found that it got into Eddles through the wound caused by the operation for the new hernia, their decision would not have been upset on appeal.

The learned County Court Judge has, in effect, so found. Can we say that he had no ground for so doing? The tendency of Courts, in cases under the similar law in England, is to strain the facts, as far as can be done, in favour of awarding compensation. If there is anything upon which the finding can be made, this Court is not at liberty to review the evidence and say whether it would have so found.

I think, though with some hesitation, that the findings appealed from should be affirmed and the appeal dismissed.

PERDUE, J.A. The first question to be considered is whether there was evidence upon which the Judge could find that the accident arose "out of and in the course of

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the employment" of the deceased: Workmen's compensation Act, 1910, s. 4. The statements of Eddles, the deceased, made after the accident to his wife, or to the doctor who attended him, may not be evidence of how the accident actually occurred: *Reg.* v. *Gloster,* 16 Cox, 471; *Gardner Peerage Case,* Le March, 169; *Reg.* v. *Nicholas,* 2 C. & K. 246, 248. But the evidence does show that the deceased went to his work in the morning apparently in good health. The school-house where he worked was just across the street from the house in which he lived. His wife saw him leave and go to the school-house and in a couple of hours she saw him returning therefrom holding his hand to his side and suffering from the injury.

I think the Judge might, from the facts that were offered in evidence, reasonably infer that the deceased received the injury in the course of his employment by the defendants: *Mitchell* v. *Glamorgan Coal Co.,* 23 T.L.R. 588.

The next question is, did the death of the deceased result from the injury? The doctor who was called in found that the deceased was suffering from a hernia which appeared to have been recently caused. Deceased for some time had had a hernia on the opposite side and was at the time wearing a truss on account of this. He was advised by the doctor to submit to an operation for the injury in question. Eddles went to a hospital for the purpose of being operated upon in respect of the injury and when there decided to undergo an operation for both ruptures at the same time. Both operations were performed with apparent success, but forty-eight hours afterwards the wounds developed symptoms of malignant infection and five days after the operation Eddles died of blood poisoning. The medical testimony simply showed that a virulent germ had, by reason of the operation, been introduced into the man's system and that

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this had produced the infection which caused his death. The germ may have obtained access through one or other of the incisions, or both incisions may at the same time have been infected by poisonous germs of the same nature.

If an accident necessitates an operation and death ensues, even though it is not a natural or probable consequence, the death may, if the chain of causation is unbroken, be said to have in fact resulted from the injury. Thus, where a slight wound was caused and while it was healing it was accidently re-opened, exposed to infection and infected, and the injured man died, his death was held to have resulted from the injury: *Dunham* v. *Clare,* [1902] 2 K.B. 292; *Ystradowen* v. *Griffiths,*]1909] 2 K.B. 533.

It is, no doubt, necessary in cases under the Act that the plaintiff should, as in other actions, prove her case. If the state of facts established is equally consistent with one or the other of two conclusions, one of which would establish her case and the other of which would disprove it, the applicant must fail in not having established her contention: *Barnabas* v. *Bersham Colliery Co.,* 3 Butterworth's Workmen's Compensation Cases, 216, confirmed in the House of Lords, 4 B.W.C.C. 119. It is urged that it has not been shown in the present case which wound became infected, and that it is quite as consistent with the evidence to hold that the germ of infection was introduced into the wound made in operating on the old hernia, as to hold that it was introduced while operating in respect of the injury in question. I must confess that I have felt considerable doubt whether the applicant had sufficiently proved her case. The evidence, however, shows that an operation was advised as necessary for the injured man's well-being, that the operation took place and that as a result of it infection and death supervened. It is true that, during the operation, another incision was made which had nothing to do with the

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injury complained of or with the operation necessitated by it, and that the infection may have entered by this other incision. But I think it is not pressing conclusions too far to say that, if the accident in question had not occurred, there would have been no operation, and that the immediate cause of death resulted from the accident through a regular chain of causation. I think the Judge would be justified in drawing the inference that both incisions were infected during the operation. There is nothing to show that the virulent germ or germs effected an entrance through one of the incisions only, so as to put upon the applicant the burden of proving that the infection entered the wound made in operating in respect of the injury in question. It is a reasonable conclusion to draw that both incisions were infected during the operation and that the fatal blood poisoning would have taken place even if the injured man had only been operated upon for the injury arising from the accident.

I think the appeal should be dismissed with costs.

CAMERON, J.A. As to the first ground of appeal, I am of opinion that there is evidence to support the finding of the County Court Judge, apart altogether from the statement made by the deceased to his physician. As to the admissibility of this evidence I do not need now to express an opinion.

As for the second ground, the injury received was the cause of the consultation and the decision as to the necessity of the operation on the right side, and that consultation and that decision gave rise to the determination of the deceased as to the operation on the left side and, consequently, to that operation itself, and it was to one or the other, or to both of these operations, that the blood poisoning and resulting death were due. So that there was a direct causal relation extending from the original injury to each of the operations and the consequences thereof. The decisions on cases arising under the similar provisions of the English Act are far-reaching, but they

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are clear and cover this case. I refer particularly to *Dunham* v. *Clare,* [1902] 2 K.B., and *Ystradowen* v. *Griffiths,* [1909] 2 K.B. 533. All the judgments in these cases seem to me much in point.

If you could say, as a fact, that the blood poisoning was due to the operation on the left side (the seat of the old hernia), nevertheless there would be applicable the words of Lord Justice Buckley in *Ystradowen* v. *Griffiths,* p. 537, where he said of the facts in *Dunham* v. *Clare*: "There was there, therefore, a disease produced, not by the accident alone, but by something else which would not have existed but for the accident." It is plain, beyond peradventure, that there would have been no operation on the left side had it not been for the operation necessitated by the injury in question, and it appears to me that the links in the chain of causation from injury to death are perfect. The words "resulting from the injury" mean, not "the necessary or the natural or the probable consequences of the injury," but the consequence in fact. And "it (the death or incapacity) need not be the consequence of the injury alone," per Lord Justice Bickley, *Ib.* p. 537.

This case, the first to come before us under the Act, is one calling for careful consideration. Here we have a statute imposing a liability on employers who are in no default and are guilty of no negligence. It is not alleged, or pretended, that the School Board was careless of its duties in any respect in this matter. The deceased was not engaged in an employment that could be considered at all hazardous. Yet the policy of the law is clear and the question of negligence on the part of the employer is immaterial. No such question is involved. The real question to be answered is, Was the death in fact the result of the personal injury?

I think the award must be sustained and that the appeal must be dismissed.

HOWELL, C.J.M., concurred.

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In the Court of Appeal.

Rostrum v. Canadian Northern Ry.

Before Howell, C.J.M., Richards, Perdue and Cameron, JJ.A.

Negligence—Master and servant—Railway Company—Res ipsa loquitur—Accident.

A master is not liable for an injury caused to a workman by the occurrence of an accident of an exceptional nature wholly unexpected, and which from past experience, as shown by the evidence, could not reasonably have been anticipated by the master or his employees, such as the springing back into a straight position of a steel rail, which had been bent or twisted as the result of an accident on the railway, as soon as the end of it is released by cutting off a nut by which it was held to the next rail. Under such circumstances negligence is not to be presumed and the maxim *res ipsa loquitur* has no application.

Ferguson v. *C. P. R. Co.*, (1908) 12 O.W.R. 943, and *Readhead* v. *Midland*, (1869) L.R. 4 Q.B. 379, followed.

Decided: 29th April, 1912.

Statement. Action to recover damages for injuries received on defendants' railway.

An accident happened on the defendants' railway and, as a result, a train was derailed and the track twisted out of shape. It did not appear whether the twisting of the track caused the derailing of the train, or *vice versa*. The plaintiff was employed by the defendants' section foreman to aid in the emergency work of straightening the track. In doing this it was necessary to detach the rails from the ties and fish-plates. Owing to the strain to which the track had been put, the nuts on the bolts, which held the rails in line between the fish-plates, could not be unscrewed, and it was necessary to remove them by the use of a cold chisel and sledge hammer. The cold chisel was fixed at the end of a handle, which was at right angles to the line of the chisel; and, to remove the bolts it was necessary for one man, holding the cold chisel by this handle, to place it above the bolt, while another, by striking the chisel with the sledge hammer, drove it through the nuts.

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After a number of nuts had been removed in this way, the plaintiff was holding the cold chisel while the section foreman was using the sledge hammer to remove the last nut which held one of the rails in place. At the first blow of the hammer the nut flew off and the rail, which had been bent by the accident, the result of which the plaintiff was assisting in repairing, sprang outwards, striking the plaintiff on his leg, which it broke. The plaintiff's action for damages resulting therefrom was tried before Macdonald, J., with a jury. The jury found, in effect, that the injury to the plaintiff was caused by the negligence of the defendant Company, or one or more of its servants, by not warning the plaintiff, who was an inexperienced man at wrecking work, that there was danger in working on, or separating, bent rails. They further held that, had the plaintiff been warned that there was a probabilty, or possibility, of the rail springing, he could have executed his work just as efficiently by, and while, standing clear of the rail in question. The jury fixed the damages, and the trial Judge entered a verdict for the plaintiff. From that the defendants appealed.

O. H. Clark, K.C., for defendants, appellants, cited *Ruegg's Employers' Liability,* 52; *Chalifoux* v. *C.P.R.,* 22 S.C.R. 721; *Readhead* v. *Midland Railway,* L.R. 4 Q.B. 379; *Gaiser* v. *Niagara,* 19 O.L.R. 31, and *O'Brien* v. *Michigan Central R.R. Co,* 19 O.L.R. 345.

M. G. Macneil and *B. L. Deacon* for plaintiff, respondent, cited *Griffiths* v. *London & St. Katherine Docks,* 13 Q.B.D. 259; *Davies* v. *England,* 33 L.J.Q.B. 321; *Priestley* v. *Fowler,* 3 M. & W. 1; *Mellors* v. *Shaw,* 1 B. & S. 437, and *Saxton* v. *Hawksworth,* 26 L.T. 853.

RICHARDS, J.A. The question in this case is whether there was anything to justify the finding of the jury that there was negligence on the part of the defendants or their servants. The evidence shows that, in the

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course of many years, no such accident was known to have happened, and that there was no reason whatever to anticipate that the rail would spring; all experience being to the contrary. I think that, if the onus is on the plaintiff, as it seems to me that it is, he has failed to show anything that would justify the jury in its finding of negligence.

But it is urged, by counsel for the plaintiff, that it was not necessary to do more than prove the accident to the plaintiff while in the defendants' employ, and that the rule *res ipsa loquitur* applies. Probably the best definition of the rule is that of Channell, B., in *Bridges* v. *North London Ry. Co.*, in the Exchequer Chamber, reported in L.R. 6 Q.B. 377. The learned Baron says, at page 391:

"It is clear that in order to succeed the plaintiff had to give evidence that the death of the deceased was caused by the negligence of the defendants. There is no real exception to the rule that in these cases the burden of proof lies on the plaintiff. There may be cases of accidents the mere proof of which supplies the necessary evidence of negligence, for the nature of the accident may be such that it could not be caused otherwise than by the defendants' negligence. There, as has been said, *res ipsa loquitur.*"

The learned Baron in the same paragraph states another line of cases where the proof of the accident may be sufficient to put the defendants on their defence. He says:

"Again there may be cases, as in *Scott* v. *London Docks Co.*, 3 H. & C. 596, where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that whether it is so or not is within the knowledge of the defendant, and not within the knowledge of the plaintiff. In such cases the plaintiff may give the required evidence of negligence, without

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himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant."

In the present case no such circumstances, as referred to by the learned Baron, arise. There was no reason whatever to suppose that the rail might spring. That, I think, is clearly established by the evidence. Then, the case does not come within the line of those cases, such as where the brick fell from a viaduct which the defendants had constructed, and injured the plaintiff, where negligence could be presumed from the fact that the defendants constructed the viaduct and it nevertheless was so badly constructed that the brick fell.

Here the defendants are not shown to have in any way been guilty of negligence in the original accident, which caused the bending of the track and the derailment of the train. They were endeavoring to put right that which had happened from some unknown cause; and the plaintiff, knowing, as everyone must, that a certain amount of danger is connected with emergency work, such as that of putting this track to rights, entered the defendants' service for that purpose and, in so doing, took upon himself the risk of any dangers which the defendants could not, by reasonable skill or knowledge, have been expected to guard against.

In *Ferguson* v. *C.P.R.*, 12 O.W.R. 943, the facts were that, as a train of the defendant Company was being drawn around a curve at the usual rate at which passenger trains were there drawn, but by a somewhat heavier engine than was ordinarily used, an apparently good rail broke across and caused an accident to the plaintiff, who was a railway mail clerk travelling upon the train in the course of his duties as such. It was held there that the rule of *res ipsa loquitur* had no application. Although

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the facts in that case differ from those in the present, the principle underlying it seems to me to be the same.

In *Readhead* v. *Midland,* L.R. 4 Q.B. 379, the plaintiff was a passenger on the defendants' railway, and was injured by an accident caused by the breaking of the tire of one of the car wheels, arising from a latent defect in the tire, which defect was not attributable to any fault on the part of the manufacturer and could not be detected previous to the breaking of the tire. That case has become a leading one. It was held in the Exchequer Chamber that the defendants were not liable for negligence, and the principle applied seems to me applicable here. I cannot see how, in any way, it could have been expected or anticipated that the rail which injured the present plaintiff would spring on being loosened from the fish-plates.

No evidence upon which the jury could have found that there was negligence on the part of the defendants having in my opinion been given, I think the appeal should be allowed with costs.

The judgment entered in the Court below should be set aside and judgment entered for the defendants with costs.

PERDUE, J.A. The plaintiff has failed to prove negligence on the part of the defendants.

In his statement of claim he alleged two grounds on which he complained the defendants had failed to exercise due care. The first of these was the failure to supply proper appliances to the plaintiff to enable him to do in safety the work he was ordered to do. There was no evidence showing what appliances should have been, or could have been, furnished, which would have obviated the danger and prevented the accident. The work on which the plaintiff was engaged was the clearing up of a wreck on the railway. The defendants could not have been expected to furnish ways, means or appliances

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in such a sudden emergency in the same manner as would be required of them in the prosecution of an ordinary work.

The other ground taken by the plaintiff was that the defendants and their foreman in charge of the work failed to warn the plaintiff of the dangerous nature of the operation which he was attempting to perform: namely, the cutting of a bent or twisted rail, which it is alleged the foreman knew, or ought to have known, was liable to fly and cause danger. The plaintiff charges that the dangerous nature of the work was well-known to the defendants' foreman, but unknown to the plaintiff. The evidence wholly failed to show that the danger was known to the foreman or that anyone feared or anticipated the occurrence of the accident. According to the evidence the occurrence was an extraordinary one. A number of joints between the bent or twisted rails had been severed without any of them showing signs of rebounding when the connection was divided. That the rail in question would fly and strike the plaintiff when the bolt was cut was a thing which was wholly unexpected and was a danger which, as far as the evidence shows, was unknown to the defendants or their servants and could not reasonably have been anticipated from past experience.

The plaintiff sought to invoke the application of the maxim *res ipsa loquitur,* but I cannot find a similarity between any of the cases in which that maxim was applied and the present one. The principle is thus stated by Erle, C.J., in *Scott* v. *London, etc., Docks Co.,* 3 H. & C. 601:

"Where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords

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reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Without discussing the cases in which *res ipsa loquitur* has been invoked, I might say that its application seems to have been carried furthest in *Kearney* v. *London, Brighton, etc. Ry Co.,* L.R. 6 Q.B. 759. In that case a brick fell from a pier of a railway bridge over a highway and injured the plaintiff while he was passing along the highway underneath. The jury having found for the plaintiff, the verdict was upheld. In that case the railway had constructed its bridge over a highway and was bound to keep it in repair so that damage would not be caused to persons using the highway. The falling of the brick, therefore, afforded some presumption of negligence when otherwise unexplained.

In the present case the defendants cannot be held responsible for the condition of the bent rail which caused the injury. That condition was the result of an accident, the responsibility for which is not shown. While the foreman and the plaintiff were endeavoring to remove this bent rail the accident occurred. The springing of the rail on cutting the joint was an exceptional and wholly unexpected occurrence. It cannot be assumed that there was a lack of proper care to guard against the happening of something unforeseen which the evidence shows had never before been known to occur.

Counsel for the defendants urged that the maxim does not apply as between master and servant, relying upon the cases cited in *Beven on Negligence,* 3rd ed. 130. In *O'Brien* v. *Michigan Central R. R. Co.,* 19 O.L.R. 345, the Ontario Court of Appeal expressed a contrary opinion. Lord Halsbury in *Smith* v. *Baker,* [1891] A.C. 335, appears to take the same view.

I think, however, that the principle sought to be invoked cannot be applied in this case for the other

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reasons which I have mentioned. The occurrence which gave rise to this action must be regarded simply as an accident for which no one can be held responsible.

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The judgment should be set aside and a judgment entered for defendants.

HOWELL, C.J.M., and CAMERON, J.A., concurred.

ROSS v. WEBB.

Before ROBSON, J.

Practice—Stay of proceedings—Action brought without authority—Notice of motion.

When an application is made by a defendant to stay proceedings on the ground that the solicitor is prosecuting the action without the plaintiff's authority, notice of the motion should be given to the plaintiff personally as well as to the solicitor.

Thatcher v. *D'Aguilar*, (1855) 11 Ex. 436, followed.

DECIDED: 7th May, 1912.

APPLICATION by defendants to stay the action because, as alleged, brought by a solicitor without plaintiff's authority.

Statement.

G. A. Elliott for plaintiff.

C. H. Locke for defendant.

ROBSON, J. The notice of the application was served on the solicitor who commenced the action. The solicitor appeared on his own behalf on the hearing of the application. No one represented the plaintiff. It does not appear that he was notified of the application. Objection of want of notice to the plaintiff was not taken.

When an application is made by a defendant to stay proceedings on the ground that the solicitor is prosecuting the action without the plaintiff's authority, the practice is to make the plaintiff a party to the motion. *Thatcher* v. *D'Aguilar*, 11 Ex. 436, cited in *Town of Barrie* v. *Weaymouth*, 15 P.R. 95.

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The fact that objection was not taken does not in my view justify proceeding without notice to plaintiff. I direct that the motion stand over until a subsequent day of which notice must be given to plaintiff personally and to the solicitor.

IN THE COURT OF APPEAL.

WILLIAMS v. BOX.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Costs—Taxation of costs—Court of Appeal—7 & 8 Edward VII, c. 12, s. 2—Meaning of the expression "successful party" in an appeal.

The limitation of the sum of $100, exclusive of disbursements, which, by section 2 of chapter 12 of 7 & 8 Edw. VII, may be "taxed and allowed for costs of appeal * * * to the *successful party* in any appeal to the Court of Appeal," refers to the costs in the Court of Appeal of the ultimately successful party, and applies in a case where a party fails in the Court of Appeal but afterwards procures a decision in the Supreme Court of Canada reversing the judgment of the Court of Appeal and giving him the costs of his appeal to that court.

DECIDED: 18th March, 1912.

Statement.

APPEAL from a decision of Mathers, C.J.K.B., affirming a ruling of the Taxing Officer.

The plaintiff was mortgagor and the defendant was mortgagee of certain property in the City of Winnipeg. The defendant obtained a foreclosure order in the Land Titles Office and a certificate of title of absolute ownership was then issued to him. The mortgagor shortly subsequent asked to be allowed to pay up and redeem the property. Upon the mortgagee's refusal the plaintiff brought her action to redeem. At the trial, judgment was given against the plaintiff. Upon appeal this judgment was confirmed by the Court of Appeal, 19 M.R. 560. Upon further appeal, this judgment was reversed by the Supreme Court of Canada, 44 S.C.R. 1, with costs of trial and both appeals, and judgment was entered

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allowing the plaintiff to redeem as prayed in the usual manner. Upon petition to the Privy Council, leave to appeal from the judgment of the Supreme Court of Canada was refused.

Upon taxation of the plaintiff's costs of appeal to the Court of Appeal, the Taxing Officer ruled that the statutory limitation of costs applied and that, under 7 & 8 Edw. VII, c. 12, s. 2, the plaintiff was entitled to tax only $100 and disbursements. The plaintiff appealed from the Taxing Officer to Chief Justice Mathers, who affirmed the Taxing Officer's ruling. The plaintiff thereupon appealed to the Court of Appeal.

J. B. Coyne for plaintiff, appellant. The Act does not impose a general limitation upon costs in the Court of Appeal. It does not provide that no greater sum than $100 and disbursements shall be taxed. It only imposes that limitation in certain cases. Its language is, "No greater sum than $100, exclusive of disbursements, shall be taxed and allowed for costs of appeal * * * to the successful party in any appeal to the Court of Appeal." The limitation upon the right to costs ordinarily taxable is only in the case of taxation of the bill of the party who succeeds in the Court of Appeal. If the party is not successful in the Court of Appeal, and later obtains the right to tax costs, the limitation does not apply. A limitation upon an ordinary right is construed strictly. This statute is also an interference with the previous law, and on that account also will be construed strictly. The successful party in the appeal to the Court of Appeal was the defendant, not the plaintiff. The limitation does not apply to the plaintiff. The Act further provides that, in cases of special importance or difficulty, the Court shall have a discretion to order that the costs be taxed without the limitation. A case in which the judgment of the Court of Appeal for Manitoba is reversed by the Supreme Court of Canada is on the face of it a case of special importance or difficulty.

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It is superfluous to ask the Court to exercise a discretion as to costs in such a case. The Legislature intended that the limitation should not be imposed in such case. It effected its intention by imposing the limitation only on the successful party in the Court of Appeal, thereby leaving the costs, where the Manitoba Court of Appeal is reversed and the unsuccessful party before that Court taxes his costs therein, those ordinarily taxable without the limitation. To defeat the plaintiff's contention the language of the section must be radically changed; a new section must be substituted in place of the one now in the statute.

G. W. Baker for defendant, respondent. The Act is intended to refer to the costs, in the Court of Appeal, of the ultimately successful party. The limitation applies to every case of taxable costs in the Court of Appeal.

THE COURT dismissed the appeal with costs.

BROWN v. BANNATYNE SCHOOL DISTRICT.

Before MATHERS, C.J.K.B.

Building contract—Completion of the work—Architect's certificate—Evidence.

The plaintiffs' contract with the defendants for the erection of a school building contained the following among other provisions:—

"Art IX. The contractor may, if he considers he has completed the works, notify the architect in writing to that effect, and the architect shall, within seventy-two hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof, or state in writing in what respects the works are incomplete, and his decision should be final, subject to arbitration as hereinafter provided. If the portion of the said work then remaining incomplete may be then readily completed by the contractor the same shall be done before he is entitled to ask for his final certificate; but if, for reasons not within the contractor's control, he cannot then complete the same, the architect shall forthwith deduct the actual value of the incomplete portions together with fifty per cent. thereon (of the propriety of which deduction and the amount thereof the architect shall be the judge subject to arbitration as herein provided) from the contract price and issue a final certificate that the works are completed and the last payment due and indicating the amount thereof. Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractors within the meaning hereof."

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At the trial the plaintiffs put in the following certificate of the architect in the form of a letter addressed to the defendant's secretary-treasurer:—

"Dear Sir. The Brown Construction Co., contractors for the Bannatyne Public School, are entitled to the final payment on their contract, deducting $1200 for work not completed as authorized under Article IX of the contract. I hold waiver of liens from the Brown Construction Co. to protect the Board against liens. I understand that the last certificate amounting to $5,832.25 was not paid, leaving the previous payments at a total of $37,625. This makes the amount due for final payment $11, 77.60.

Yours respectfully, J. N. Semmens."

The following memorandum was written at the bottom of the letter:

Amount of contract	$48,062.00
Marked cheque	2,403.10
Extra No. 1	100.00
Extra No. 2	125.00
Extra No. 3	12.50
Total	$50,702.60
Amount retained	$ 1,200.00
Previous payments	37,625.00
Amount due	11,877.60
	$50,702.60

The defendants offered evidence tending to show that the contract had not been substantially fulfilled.

Held, (1) Although the contract called for a certificate of satisfaction or completion as well as for payment, a certificate for p yment implied a certificate of satisfaction.

Hudson on Building Contracts, vol. 1, p. 383; 3 *Halsbury*, sec. 429; *Wykoff* v. *Meyers*, (1870) 44 N.Y. 143, and *Clarke* v. *Murray*, (1885) 11 Vic. L.R. 817, followed.

2) The contract having made the propriety of the deduction of the $1200 by the architect for uncompleted work and the amount thereof matters concerning which the architect should be sole judge subject to arbitration, it also made his decision final as to both matters, which decision involved a finding that the uncompleted work could not be readily performed at that time, and it was not necessary for the plaintiffs to give evidence to prove that.

(3) It was not necessary that the certificate should contain the particulars of the deductions made.

(4) It was not necessary to give the defendants notice of the plaintiff's application to the architect for his final certificate.

(5) The architect's certificate was therefore final and conclusive under the contract and the evidence tendered by the defendants was not admissible.

DECIDED: 19th April, 1912.

Statement.

ACTION to recover from the defendants, a School District, the balance due on a contract for the erection

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of a public school building. The amount sought to be recovered was $11,877.60 as balance of the contract price and $2,403.10, deposited by the plaintiffs with the defendants as security. The plaintiffs also asked for a mechanics' lien; but, as no evidence was given in support of that portion of the claim, it was treated as abandoned.

The defendants admitted the contract, but denied that the plaintiffs had substantially completed the building, or that they had complied with the conditions of the contract entitling them to payment, in that they had not obtained a final certificate from the architect or produced satisfactory, or any, evidence that no mechanic's lien other than their own, or those for which they held discharges existed. They also set up that a substantial portion of the work was incomplete, and might have been readily completed before the action, and they counterclaimed for damages for non-completion to time.

C. P. Fullerton, K.C., and *J. P. Foley* for plaintiffs cited *Clemence* v. *Clarke*, 2 Hudson on Building Contracts, 41, and *Davidson* v. *Francis*, 14 M.R. 141.

J. B. Coyne and *A. W. Morley* for defendants cited *Chambers* v. *Goldthorpe*, [1901] 1 K.B. 624.

MATHERS, C.J.K.B. The contract is dated the 15th of April, 1911. By article I the work is to be performed "under the direction and to the satisfaction of J. N. Semmens, architect, acting for the purposes of this contract as agent of the owner." By Article VI it provides that the work shall be completed by the 15th of November, 1911, and that the contractor shall complete two rooms ready for occupancy by the first day of September, 1911, and an additional room by the fifteenth day of September, 1911. The contract price is $48,062.

By Article IX "The final payment shall be made within twenty days after the contractors have substantially fulfilled this contract, if the contractors shall have

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given satisfactory evidence that no mechanic's lien other than his own or liens of which he holds discharges exist in respect of the said works; otherwise the final payment shall be made within two days after the time for filing mechanics' liens has elapsed. The contractor may, if he considers he has completed the works, notify the architect in writing to that effect, and the architect shall, within seventy-two hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof, or state in writing in what respects the works are incomplete, and his decision should be final, subject to arbitration as hereinafter provided. If the portion of the said work then remaining incomplete may be then readily completed by the contractor the same shall be done before he is entitled to ask for his final certificate; but if, for reasons not within the contractor's control, he cannot then complete the same, the architect shall forthwith deduct the actual value of the incomplete portions together with fifty per cent. thereon (of the propriety of which deduction and the amount thereof the architect shall be the judge subject to arbitration as herein provided) from the contract price and issue a final certificate that the works are completed and the last payment due and indicating the amount thereof. Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractors within the meaning hereof."

At the trial the plaintiffs put in two certificates by the architect, the first of which, dated the 21st December, 1911, and addressed to the Secretary-Treasurer of the School Board, is as follows:

"Dear Sir: I have made my final inspection of the Bannatyne Public School and, except for a few minor items, I find that the building is completed. I hold guarantees from the Brown Construction Co. for a number of items which cannot very well be completed this fall, but will have to be held over till the spring when the mild weather will allow of their completion.

"I understand that the Board are willing to abide by my decision in the question of the floors. As my only reason for condemning them was that they were not

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strictly in accordance with the specifications in the matter of colour, but were in every way up to the standard in the matter of durability, I feel that the Board will lose nothing by accepting these floors.

Yours respectfully, J. N. Semmens."

On the 26th January, 1912, the plaintiffs wrote the architect a letter from which the following is an extract:

"While we gave you a guarantee to complete one small item which cannot be completed until the weather gets warmer, we think it possible that the School Board may urge that the value of this painting, together with 50 per cent. thereon, should be deducted from the contract price in strict accordance with the words of the contract and final certificate issued for the amount due us. We would therefore ask you to carry out the terms of the contract and issue a final certificate that the works are completed and the last payment due, and indicating the amount thereof. Please let us have this final certificate immediately."

In response to the above mentioned letter, the architect on the 10th February, 1912, gave another certificate in the form of a letter addressed to the Secretary-Treasurer of the School Board as follows:

"Dear Sir: The Brown Construction Co., contractors for the Bannatyne Public School, are entitled to the final payment on their contract, deducting $1200 for work not completed as authorized under Article IX of the contract. I hold waiver of liens from the Brown Construction Co. to protect the Board against liens. I understand that the last certificate amounting to $5,832.25 was not paid, leaving the previous payments at a total of $37,625. This makes the amount due for final payment $11,877.60.

Yours respectfully, J. N. Semmens."

The following memorandum was written at the bottom of the letter:

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Amount retained	$ 1,200.00
Previous payments	37,625.00
Amount due	11,877.60
	$50,702.60

The defendants proposed to give evidence tending to show that the contract had not been substantially fulfilled. The admission of this evidence was objected to on the ground that the architect's certificate is final and conclusive, subject to an appeal to arbitration.

As it appeared that this was the real determining point in the case, I took time to consider it and adjourned the further hearing *sine die*.

It was admitted, and I think properly so, that the certificate of the 21st December, 1911, is not a final certificate within the meaning of the contract. I think it quite clear that the architect had no power to accept the contractor's guarantee as to any portions of the work not complete and that a certificate showing that he had done so is not a final certificate.

The objections raised to the certificate of the 10th of February, 1912, are as follows:

1. That it does not certify that the works are completed as required by the contract.

2. That there is no evidence that the work for which the architect makes a deduction from the price could not then have been readily completed.

3. That it should have contained a statement showing in what respect the work is incomplete.

4. That the defendants should have been given notice of the plaintiffs' application for a final certificate, and that the architect had no power to give a final certificate until such notice was given.

As to the first objection the authorities are against the defendants' contention. In *Hudson on Building Contracts*, vol. I, at p. 383, it stated that, if a certificate

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of payment and satisfaction is required, a certificate for payment will imply a certificate of satisfaction. The law is similarly laid down in 3 *Halsbury,* sec. 429. In *Wykoff* v. *Meyers,* 44 N.Y. 143, a building contract provided that the last instalment should be paid when all the work was completely finished and certified to that effect by the architects. The architects certified that the last payment was due and the Court held this to be clearly the same in effect as if the architects had certified that the work was all completely done. In *Clarke* v. *Murray,* 11 Vic. L.R. 817, the contract provided for payment when the whole work was completed to the satisfaction of the architect and his certificate given to that effect. The architect certified that the contractor was entitled to receive a sum named "being the final certificate in full of all demands." The Court held this a sufficient certificate that the whole work was completed to the satisfaction of the architect. Apparently the same was held in *Harman* v. *Scott* 2 N.Z. Ap. Cas. 407. In my opinion the first objection fails.

As to the second objection, that there is no evidence that the incomplete work for which a deduction of $1200 is made could not have been readily completed before action, the contract makes the propriety of such deduction and the amount thereof a matter concerning which the architect shall be sole judge subject to arbitration. The architect having decided to make the deduction, I think the contract makes his decision final both as to the amount of the deduction and the propriety of it, and that decision involves a finding that the work could not be readily performed at that time: *Richards* v. *May,* 10 Q.B.D. 400.

Article IX of the contract provides that the contractor may, when he considers he has completed the works, notify the architect in writing to that effect and require the architect within 72 hours to issue a final certificate

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that the works are completed and the last payment due, or state in writing in what respects the works are incomplete. This last requirement seems to be for the benefit of the contractor so that he may go on and complete if he can then do so. If, however, the part of the work then remaining incomplete cannot be readily completed and the architect proceeds to deduct its value plus fifty per cent. thereof, the necessity for setting out the particulars does not exist. The contract does not require the architect to set out in his certificate the particulars of the deductions made. Under these circumstances *expressio unius est exclusio alterius,* and I think the certificate sufficient although the amount of the deduction only is stated. The third objection to the certificate therefore fails.

As to the fourth objection, I do not think the pleadings permit the defendants to raise the objection that notice to them of the application for a final certificate was necessary. Moreover, I do not think it would be a good defence if it were pleaded. I must not only hold against the objection, but, under the circumstances, I refuse the defendants' application to amend.

In my opinion the certificate is final and conclusive and the evidence tendered is not admissible.

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RE THE MANITORA COMMISSION COMPANY.

Before MATHERS, C.J. K.B.

Winding-up—Insolvency—Winding-Up Act, R.S.C. 1906, *c.* 144, *ss.* 3, 1 *—Evidence—Affidavit on information and belief—Acknowledgment of insolvency—One-man company.*

1. A winding up order under the Winding-Up Act, R.S.C. 1906, c. 144, finally determines the rights of the parties within the principle laid down in *Gilbert* v. *Endean*, (1878) 9 Ch. D. 259, and a petition for such an order cannot be supported by statements on information and belief.

2. The production by the Company of its books of account to an auditor employed by the creditors does not amount to the *exhibiting of a statement showing its inability to meet its liabilities*, so as to bring the Company within section 3 of the Act, although such auditor swears that, from his examination of the books and from information derived from the President, he came to the conclusion that the Company was hopelessly insolvent, and that the President admitted to him that the Company was insolvent.

The petitioners sought to show that the Company had "otherwise acknowledged its insolvency," and proved that the President, who was also the manager of the Company, had made such an acknowledgment.

Held, that such acknowledgment was not the acknowledgment of the Company required by clause (d) of section 3 of the Act. There must be some formal act of the directors or of the shareholders or of some officer expressly or impliedly authorized to make such an acknowledgment on the Company's behalf, and nothing of the kind was shown in this case.

Re Qu' Appelle Valley Farming Co., (1888) 5 M.R. 160, and *Parker & Clark's Company Law*, 351, followed.

The president of the Company, when examined on his affidavit filed in opposition to the petition, stated that he was then the only person beneficially interested in the Company, but it appeared that there were at one time four other shareholders, holding one share each as against his 196.

Held, that, as against those other shareholders, although their interest, if any, was small, the statement of the President was not evidence and could not be accepted, and therefore it was not established that he was the sole beneficial owner of all the shares and the Company must be deemed to be a real, and not a sham entity, and could not be dealt with as a one-man company.

Held, also, that section 15 of the Act only applies in a case where the petitioners have made such a *prima facie* case of insolvency as would justify a winding up order and that, as the petitioners had failed to do this, the Court could not make an order under that section

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adjourning the application and for an inquiry into the affairs of the Company by an accountant, although it had opposed the petition on the ground that it had not become insolvent. 1912

DECIDED: 20th April, 1912.

APPLICATION by W. J. Bettingen & Co. to wind up the Manitoba Commission Company, Limited, on the ground that the Company was insolvent. Statement.

A. J. Andrews, K.C., and *H. A. Burbidge* for applicants cited *Royal British Bank* v *Turquand*, 6 E.& B. 327; *Hovey* v. *Whiting*, 14 S.C.R. 515; *In re A. Company*, [1894] 2 Ch. 349, and *In re Anglo-Bavarian S. B. Co.*, [1899] W.N. 80.

E. Anderson, K.C., for the Company cited *Re Outlook Hotel Company*, 2 Sask. 439; *Re Lake Winnipeg Co.*, 7 M.R. 255; *Re Rapid City*, 9 M.R. 574; *Re Grundy Stove Co.*, 7 O.L.R. 252; *Re Ewart Carriage Works*, 8 O.L.R. 529, and *Re Kootenay Brewing Co.*, 6 B.C.R. 112.

MATHERS, C.J.K.B. The above Company was incorporated under the Manitoba Joint Stock Companies Act, on the 4th September, 1901, with power to buy and sell on commission for immediate delivery, or for future delivery, grain of all kinds and other farm produce, and to carry on a general commission business. The nominal capital of the Company was $1,000 divided into 200 shares of $5 each, the whole of which was subscribed and paid up. In 1908 supplementary letters patent were issued increasing the capital stock to $25,000 by the issue of 4800 shares of new stock of the par value of $5 each and conferring somewhat enlarged powers upon the Company. So far as appears none of the new stock was subscribed for, or paid up.

On the 31st December, 1907, the last year for which a statement was filed with the Provincial Secretary, the shareholders consisted of John M. Chisholm, Alexander Macdonald, N. M. Paterson and H. A. M. Paterson, each

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holding one share, and Hugh S. Paterson, holding 196 shares. N. M. Paterson and H. A. M. Paterson are the son and wife of Hugh S. Paterson who was, and is, president and manager of the Company.

The petitioners claim to be creditors of the Company to the extent of $415, which sum represents their loss on the re-sale of wheat sold by them to the Company for October delivery, and which the Company refused to accept.

As the petition is based on the insolvency of the Company, the petitioners must not only allege, but strictly prove, the existence of one or more of the circumstances set out in section 3 of The Winding-up Act, R.S.C. 1906, c. 144; *Re Qu'Appelle Valley Farming Co.*, 5 M.R. 160; *Re Lake Winnipeg Transportation Co.*, 7 M.R. 255; *Re Rapid City Farmers Elevator Co.*, 9 M.R. 574; *Re Ewart Carriage Works Ltd.*, 8 O.L.R. 527.

The petition alleges such facts that, if established, the Company must be deemed to be insolvent under sub-sections (*b*), (*c*) and (*d*) of that section.

It alleges that on the 2nd November last the Company called a meeting of its creditors for the purpose of compounding with them. It also alleges that a further meeting was called for the same purpose on the 8th November.

It alleges that on the 3rd November the Company exhibited, or permitted to be exhibited, or acquiesced in the exhibition of, a statement showing its inability to meet its liabilities, by producing its books of account to one Bisaillon, who acted as auditor for the Company's creditors, and that Bisaillon prepared a statement showing the insolvency of the Company, the correctness of which was admitted by the president and directors of the Company.

It also alleges that the Company has otherwise acknowledged its insolvency and, by its president, secretary and

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treasurer, admitted its inability to meet its liabilities, and has asked certain of its creditors for an extension of time for payment of its liabilities and has asked certain of its creditors to accept a composition, and that the Company is in fact insolvent.

The petition is supported by two affidavits, one from Edward James, assistant general manager of the petitioners, and one from the said Bisaillon.

The affidavit of James states in paragraph 2 that he has read over the petition and that "such statements in the said petition as relate to my own acts and deeds are true, and that such statements in the said petition as relate to the acts and deeds of the said petitioners or to the claim of the said petitioners against the above named Company are true, and such of the said statements as relate to any of the acts and deeds of any other person are true to the best of my knowledge, information and belief."

There are no "acts and deeds" of James set out in the petition and the statement verifying his "acts and deeds" in the affidavit is absolutely meaningless. Apart from paragraph 3, which verifies the petitioners' claim paragraph 8, which identifies a notice calling a meeting for November 2nd, and paragraph 9 stating what took place at that meeting, it appears from the affidavit itself that the deponent had no personal knowledge of any of the facts sworn to, but derived his information from statements prepared by and information derived from the said Bisaillon.

James was cross-examined upon this affidavit, and from his examination it appears that he was not present at the meeting called for either the 2nd or the 8th November, and of course could only know by hearsay what took place at those meetings. It also appears that he had no conversation with Paterson prior to the time the affidavit was sworn to, and the petition filed, at which

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Paterson said anything which could be construed as an acknowledgment of the Company's insolvency, even if an admission by him would be sufficient for that purpose.

In my opinion a winding-up order finally determines the rights of the parties within the principle of the decision in *Gilbert* v. *Endean*, 9 Ch. D. 259, and a petition for such an order cannot be supported by statements on information and belief: *Gilbert* v. *Endean* has been followed in *Allan* v. *Man. & N. W. Ry.*, 9 M.R. 389; *Braun* v. *Davis*, 9 M.R. 540, and by myself in *Canada Supply Co.* v. *Robb*, 20 M.R. 33, and the principle is now well established. By the English winding-up rules, a form of affidavit verifying a winding-up petition on information and belief is prescribed, and is there sufficient; but there is no such rule in force here, and the Court here should be guided by the principle on which it acts in other matters. In my opinion the affidavit of James, in so far as it relates to the allegations of insolvency in the petition, must be entirely disregarded.

The letter from the Company calling the meeting of November 2nd does not state the purpose of the meeting. It says, "Please have representative meet the creditors at 3 p.m. to-day in Council Chamber." Without any account of what took place at the meeting, it would be impossible to infer that it was a meeting of the Company's creditors called for the purpose of compounding with them.

The only other evidence in support of the petition is the affidavit of Bisaillon. He cannot speak of what occurred at any meeting, because he was not present at any meeting and does not pretend to state what took place thereat. He says W. J. Bettingen, one of the petitioners, asked him as an auditor to examine the books of the Company for the purpose of examining its financial position as nearly as possible. He says he obtained from H. S. Paterson, president of the Company, its books and

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records, and proceeded to examine the same and, in connection with the examination, he obtained from the said H. S. Paterson information from time to time with regard to the affairs of the Company, in order to enable him to ascertain the position of the Company. He further says that, owing to the limited time at his disposal, he was unable to make a complete audit or arrive at a balance, but examined the books of the Company and secured from Mr. Paterson sufficient information to enable him to arrive at the conclusion that the Company was hopelessly insolvent, at which conclusion he did arrive from the examination of the books. That statement is but an expression of the affiant's opinion, and is not evidence of the Company's insolvency, much less is it an acknowledgment by the Company of its own insolvency.

Bisaillon embodied the result of his examination in the form of a report to W. J. Bettingen. It is not pretended that this report was prepared or sent with the sanction of the Company or of Mr. Paterson, and I did not understand counsel for the petitioners to contend that the making of this report by Bisaillon constituted the exhibition of a statement by the Company showing its inability to meet its liabilities within s-s. (*c*) of sec. 3 of the Act. There is no evidence from which I could conclude that the making of that report by Bisaillon was the act of the Company. Neither do I think that the throwing open of the Company's books to examination by Bisaillon brought the Company within that subsection.

Bisaillon's affidavit further states in the seventh paragraph: "I communicated with Mr. Hugh S. Paterson the result of my examination of the said books and the said Hugh S. Paterson, president of the said Company, admitted to me that the Company was insolvent and was unable to pay its debts," and, in paragraph 18, he says: "At the time that I was examining the said

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books as aforesaid, the said Hugh S. Paterson, on behalf of the Company, offered the said W. J. Bettingen, representing the said creditors as aforesaid, in my presence, to pay the sum of $5,000 in full of all liabilities of the said Company to its creditors, other than the said Bank, at the rate of $1,000 per month, provided he be re-instated as a member in good standing on the Exchange, and I am also informed and verily believe that, at a meeting of the creditors held on the 8th November, 1911, the said Company, through its president, Hugh S. Paterson, offered the said creditors to pay 33 1/3 per cent. of the liabilities of the Company to the said creditors in full thereof."

It is contended that the statements contained in paragraphs 7 and 18 amount to an acknowledgment of the Company's insolvency within paragraph (*d*) of section 3.

There is no evidence that the Company in any formal way acknowledged that it was insolvent. Paterson made an affidavit in opposition to the petition upon which affidavit he was examined. In that examination he swears that he is the only person beneficially interested in the Company and that he knows no person else who has any interest in it. If that statement is true, then this is distinctly a one-man company; but, notwithstanding, the statute having been complied with, it is a legal entity and must be dealt with as such: *Salomon* v. *Salomon,* [1897] A.C. 22. The directors of a company, it has been held, may make an assignment for the general benefit of the company's creditors without the sanction of the shareholders: *Hovey* v. *Whiting,* 14 S.C.R. 515. It follows, I think, that the directors without the sanction of the shareholders can make an acknowledgment of the company's insolvency for the purpose of winding up. No act of the Board of Directors acknowledging the Company's inability to pay its debts has been shown. What is shown is such an acknowledgment by the president and manager. As president Mr. Paterson, in the absence of anything in the by-laws or charter to the

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contrary, has no greater authority than any other director: *Almon* v. *Law,* 26 N.S.R. 340; *Masten's Company Law,* 237. As manager his business would be to manage and not to put an end to the Company: *In re Briton Medical Ass.,* 11 O.R. 478. And, of course, as one director out of a board of three, he could not exercise the powers of the board without a special delegation of powers to him where that is permitted: *Lindley on Companies,* 205; 10 *Cyc.* 775.

It follows, I think, that Paterson could not, as director, president or manager, or as all three, make an acknowledgment of insolvency such as is required by s-s. (*d*) of sec. 3. Such an acknowledgment to be effective would have to be the act of the Company and not merely a statement made by an officer of the Company: *Parker & Clark Company Law,* 351.

It is contended that Mr. Paterson is the Company; that he is the owner of all the stock, and that no person else has any beneficial interest in it. If that fact were established by evidence that could be looked at as against the four others who appear on the books of the Company as shareholders, a serious question would arise as to whether or not an acknowledgment, made by him as such sole shareholder, could not be treated as the Company's act. Generally speaking, shareholders have no agency for the corporation and cannot bind it either by their acts, declarations or admissions: 10 *Cyc.* 760. But in cases where, by the law governing the Company, the act in question is not one of the matters to be performed by the directors, the shareholders can no doubt control the Company.

It does appear, however, that there were at one time four other shareholders, two of whom were directors. There is nothing to show, except the statement of Paterson, that he is the sole owner or that these four shareholders, whom I must assume to have been *bona fide*

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shareholders, have ever parted with their interests. As against these, the statement of Paterson is not evidence and cannot be accepted. So far as appears it was made without the sanction, concurrence or knowledge of these other shareholders. It is true their interest, if any, is small, but it may be a real interest and the principle is the same whether the interest be great or small.

The evidence falls short of establishing that Paterson is the sole beneficial owner of the shares of the Company, and I must therefore deal with the Company as a real and not a sham entity, In *Re Qu'Appelle Valley Farming Co.*, 5 M.R. 160, former Chief Justice Taylor expressed the opinion that, to bring a Company within clause (*d*) of sec. 3, there must be something actively done by it as an acknowledgment. The learned authors of *Parker & Clark's Company Law*, 351, go farther and submit that the acknowledgment must be such an act of the Company as would render it liable upon a contract. I agree that it must be some formal act of the directors or of the shareholders or of some officer expressly or impliedly authorized to make such an acknowledgment on the Company's behalf. Nothing of the kind is shown here.

The further statement contained in paragraph 18 of Bisaillon's affidavit does not help the petitioners. It shows that the offer to pay $5,000 in full of all liabilities was upon a condition that he be re-instated as a member of the Exchange. I do not think an offer made, accompanied by such a condition, can be construed as an acknowledgment of the Company's inability to pay its creditors in full.

Should I come to the conclusion that the material did not justify a winding-up order, the petitioners request me to adjourn the application and to make an order under section 15 for an accountant to inquire into the affairs of the Company.

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That section provides that, if the Company opposes the application on the ground that it has not become insolvent, such an order may be made. In my opinion the power conferred by that section can only be exercised in a case where the petitioners have made such a *prima facie* case of insolvency against the Company as would justify a winding-up order, and the section has no application to a case such as this where the petitioners have failed in that respect. No order can therefore be made under that section.

The petition to wind up the Company must be dismissed with costs.

IN THE COURT OF APPEAL.

KELLY v. ENDERTON.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Vendor and purchaser—Principal and agent—Misrepresentation—Rescission of contract.

Action to set aside a sale of land made to the defendants on the ground of alleged misrepresentations made by the defendant Russell and of concealment by Russell of certain facts known to him which, if made known to the plaintiffs, would have caused them to hold the property for a much higher price. It appeared that Russell, who was in some way connected with the real estate firm of C. H. Enderton & Co., approached the plaintiffs with a view to securing from them an option on the property, saying that he was acting for one Bell who wanted to buy it. Plaintiffs signed an option of sale to C. H. Enderton & Co. for the price agreed on and agreed to allow that firm a "commission" of $1000 on the sale although they were not plaintiffs' agents for making the sale. The sale was afterwards carried out and the conveyance made to the defendant Simpson, the nominee of Russell who provided the necessary funds. The $1000 was deducted from the cash payment made to plaintiffs, and Enderton & Co. allowed Russell the benefit of the $1000 commission.

Held, RICHARDS, J. A., dissenting, that there was nothing in what had taken place to constitute Russell the plaintiffs' agent for the sale of the property or to create any fiduciary relationship between

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them and him, and that the plaintiffs could not have the sale set aside by reason of any concealment by him of any facts tending to enhance the value of the property or by reason of his alleged untruthful statement to the plaintiffs, when he was negotiating for the option, that he knew of no such facts.

Per PERDUE J. A. When a conveyance of the land has been executed and delivered, nothing in the way of misrepresentation short of actual, positive fraud will warrant a judicial rescission between vendor and purchaser, and the mere concealment of the name of the real purchaser will not be sufficient, even if the vendor would not have sold if he had known who the real purchaser was.

Fellowes v. *Gwydyr*, (1826) 1 Sim. 63; *Bell* v. *Macklin*, (1887) 15 S.C.R. 576, and *Brownlie* v. *Campbell*, (1880) 5 A.C. 925, followed.

DECIDED: 20th May, 1912.

Statement. ACTION by plaintiffs to set aside a sale made to defendants on the ground of alleged misrepresentations made to them.

The following judgment at the trial was delivered by

MATHERS, C.J.K.B. I find that neither Enderton nor Shepard bought the property in question from the plaintiffs, and that they have not now, and never had, any interest therein.

It is not pretended that the defendant Simpson took any other part in the transaction than to allow his name to be used. I find that the relationship of principal and agent did not arise at any time, from the inception of the negotiations until the close of the transaction, between the plaintiffs and the defendant Russell.

The plaintiffs charge that Russell made false representations to induce them to sell, upon which they acted to their prejudice. I find that that charge is not sustained by the evidence.

The action will be dismissed as to all the defendants, with costs, to be taxed without regard to the statutory limit of three hundred dollars.

Plaintiffs appealed.

C. P. Fullerton, K.C., and *J. E. O'Connor* for plaintiffs, appellants, cited *Nixon* v. *Dowdle*, 20 W.L.R. 749;

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Argument.

Lewis v. *Hillman,* 3 H.L.Cas. 607; *McGuire* v. *Graham,* 16 O.L.R. 431; *McPherson* v. *Watt,* 3 A.C. 254; *Walters* v. *Morgan,* 3 De G. F. & J. 718; *Smith* v. *Kay,* 7 H.L.Cas. 750; *King* v. *Anderson,* Ir. R. 8 Eq. 147; *Laycock* v. *Lee,* 19 W.L.R. 841; *Dunne* v. *English,* L.R. 18 Eq. 524; *Ewing* v. *Dominion Bank,* 35 S.C.R. 133; *Archer* v. *Stone,* 78 L.T. 34; *Smith* v. *Wheatcroft,* 9 Ch. D. 223, and *Gordon* v. *Street,* [1899] 2 Q.B. 641.

C. P. Wilson, K.C., and *V. Gordon* for Russell cited *Dart* v. *Rogers,* 21 M.R. 721.

A. J. Andrews, K.C., and *F. M. Burbidge* for other defendants cited *Bell* v. *Macklin,* 15 S.C.R. 576; *Nicholson* v. *Peterson,* 18 M.R. 106, and *Mey* v. *Simpson,* 17 M.R. 597, 42 S.C.R. 230.

HOWELL, C.J.M. I have read the judgment of my brother Cameron, and concur with his views. The plaintiffs allege in paragraph 7 of the statement of claim, and reiterate in paragraph 14, that they agreed to sell to Bell, or his nominees, or to Enderton & Co., and agreed to pay the latter $1,000 commission, and at the trial they put in and proved an option or agreement to sell to Enderton & Co., and not to Bell, and in that agreement there is a covenant to pay Enderton & Co. a commission of $1,000.

It is not alleged in the pleadings, and there was no attempt at the trial to prove, that this document was really not an agreement to sell, but an appointment of agency, and it is clear that up to the time of the execution of this document Enderton & Co. were not the plaintiffs' agents to sell this property.

A sale can be made by a principal to an agent which will undoubtedly be good as against the principal; but, if a sale is made to a third person who is really buying for the agent without the knowledge of the vendor, on this ground alone the sale will be set aside: *McPherson* v. *Watt,* 3 A.C. 263; *Lewis* v. *Hillman,* 3 H.L.C. 607.

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However, in this case the plaintiffs allege that they agreed to sell to their agent, creating the agency by the agreement of sale, but the grievance is that they conveyed to Simpson, who was, they allege, really Enderton & Co. I cannot see what was wrong in this: *Pisani* v. *Atty. Gen.*, L.R. 5 P.C. 540.

It is claimed that representations were made by Enderton & Co., their agent, which induced the sale. This could not be, for they were not agents for sale until the agreement for sale was executed.

This subject need not be followed further, for I am satisfied Simpson's name was used, not for Enderton & Co., but for Russell.

The appeal is dismissed with costs.

RICHARDS, J.A. In this case I should not feel justified in disturbing the finding of the learned trial Judge, that Messrs. Enderton & Co. did not, in fact, enter into the transaction in any way.

The evidence, however, shows that the defendant Russell did enter into it, purporting to act on behalf of another party, but actually acting for himself, and that he asked the plaintiffs for, and was allowed, a commission. He was in fact the purchaser himself, and he concealed this fact from the plaintiffs. He was aware of matters which, if he was the plaintiffs' agent, it was his duty to disclose to them, which, if disclosed to them, would, I think, have prevented their selling to him and which would, if he was their agent and bought from them, entitle them to have the sale set aside and the property reconveyed to them, because of the non-disclosure.

It is argued, on behalf of the defendant Russell, that the so-called commission was really, and to the plaintiffs' knowledge, only a rebate in price, and that the plaintiffs knew that he purported to act only for the supposed purchaser, and not for them. It is true that they

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thought so, and there is no doubt that he so represented the fact to them. Then the question arises whether, by taking a commission from the vendor, even although he might be acting for a purchaser, he would not, in fact, make himself their agent also, and render it his duty to disclose to them all he knew, which might affect the probability of their making the sale.

It is argued that it is the custom for agents, approaching the owner of property with a view of purchase, to really act for the purchaser, as Russell purported to do in this case, and yet to take a commission from the vendor. There is no doubt that is frequently done in transactions in Manitoba. But I cannot see that the taking of a commission, in such a case, can be treated, as between the agent and the vendor, as merely a rebate in price, or as a payment, in effect, by the purchaser of the commission, because of the price being rebated to the extent of the commission.

To my thinking, to lay down a doctrine of that kind would be most dangerous, and would lead to disastrous consequences. It seems to me that it would, in effect, be a holding that agents are under no liability to their principals, as it would be easy, in every case, for the agent to allege that he purported to act on behalf of the purchaser, and thereby escape all liability to do that which his agency for the vendor, of which the taking of the commission is strong, if not conclusive, evidence, binds him to do. I think this would be particularly the case where the agent is, in fact, the purchaser himself. It seems to me that, unless the sum which the principal allows to be taken off the price is distinctly agreed to as being, and in fact is, a rebate in price, the agent cannot, by any allegation that he treated it as such, although asking for it as a commission, escape his liability as agent of the vendor.

It is argued on behalf of the defendant that the plain-

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tiffs have stated in their evidence that they do not see what they have lost. If the sale had been really to a third party, as Russell pretended and they thought, and not one to Russell, they would have got no more than they now get under the sale to Russell, and that, I think, was what was in their minds when stating that they did not see what they had lost. But that is altogether apart from the right of a principal to require an agent, who has bought from him while guilty of concealment of material facts, (one of which is the fact that he, the agent, is the real buyer), to reconvey. Whether they did, or did not, think they had made any loss, is, to my mind, immaterial in such a case.

In my opinion Russell did, by taking the commission, which I think was really treated as a commission paid by vendor to agent, no matter what it is now called, make himself the agent of the plaintiffs, and lay himself under an obligation to disclose to them that which he concealed, viz., facts which would indicate a probable advance in values in the neighborhood where the property was situated, and the fact that he, the agent, was the actual purchaser. If that be the case, that he was their agent, then, as a result of the concealment, he has no right, if seems to me, to retain the property.

The plaintiffs' pleadings do not on their face make out their case against Russell, as an agent, as clearly as they should have. But all the facts of the transaction were gone into at the trial. It is not shown that anything, not in evidence, could have been so given if the pleadings had been different. The case against Russell seems to me proved by his own testimony. I do not know that an amendment of the pleadings would be necessary to make him liable. But, if necessary, I think an amendment should be allowed.

I would dismiss the appeal without costs as against the defendants Enderton & Co.; but would allow it with

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costs as against the defendant Russell, and order that, on repayment by the plaintiffs of the amount paid them on the purchase money and the discharge by them of the mortgage taken for balance of purchase money, the defendants Russell and Simpson should execute such documents as are necessary to reconvey the property, clear of incumbrances, to the plaintiffs.

PERDUE, J.A. The plaintiffs' claim for relief is by no means clearly expressed in the statement of claim. A number of alleged grievances, more or less inconsistent with each other, are set out, but it is difficult to ascertain what is the plaintiffs' actual cause of complaint. Only one of the plaintiffs, Martin Kelly, gave evidence when they were attempting to prove their case. The only grievance he even remotely refers to in his evidence is that, if he had known that Simpson was a partner in the firm of Enderton & Co., he would not have transferred the land to him. And yet the document upon which the transaction rests is an option of purchase given by the plaintiffs to Enderton & Co. This option was signed by both the plaintiffs and gave Enderton & Co. the right to purchase the property at the price and on the terms set forth, and agreed to give the latter a commission of $1,000 on the sale going through. Further, in the seventh paragraph of the statement of claim the plaintiffs alleged that they agreed to sell to Bell, or his nominee, or to the firm of Enderton & Co. on the terms contained in the option and to pay the latter a commission of $1,000. I can find no evidence showing that the option was given to Enderton & Co. to enable them to sell as agents for the plaintiffs, and there is nothing, except the agreement to allow a commission on the sale to themselves going through, to prove that they were the plaintiff's agents.

The other plaintiff, Michael Kelly, was called in rebuttal at the very close of the case. We can assume

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that he would then know, if he would ever know, what cause of complaint he and his co-plaintiff had against the defendants or any of them. And yet, even then, he was quite unable to say what grievance the plaintiffs had. He was asked: "What was your injury?" After an objection by his counsel, the trial Judge ruled that he should answer, and the answer he gave was, "I would'nt say there would be any injury," followed by a statement showing that his objection was to paying a commission. He was again pressed with the question: "What was the injury to you?" and his reply was, "There might be no injury."

The first material allegation in the statement of claim is that, prior to the sale, the defendants Enderton and Shepard were employed by the plaintiffs as their agents in the rental of stores and that they assumed to act as agents for the plaintiffs in the sale of the property. It is then alleged that, prior to the same date, the defendants knew that the Hudson's Bay Company were about to buy the property opposite to the plaintiffs', a fact which would greatly enhance the value of the plaintiffs' property; that the defendants, knowing that value would be enhanced, in conjunction with other parties formed the design of purchasing properties in the vicinity including that of the plaintiffs; that thereupon Enderton and Shepard, through their agent, approached the plaintiffs and finally obtained the option above referred to. The complaint following upon these allegations is that the name of Bell was used in the first place, and the name of Simpson afterwards when the conveyance was given, for the purpose of deceiving the plaintiffs and concealing from them that Enderton and Shepard were the real purchasers of the land. Dealing with the case attempted to be made by the plaintiffs down to this point, I think it is clear they must fail. Enderton and Shepard both denied in the most positive manner

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that they or either of them were purchasers of or interested in the property. The plaintiffs offered no direct evidence contradicting this, but endeavored, at great length, to show by entries in the books of Enderton & Co., by the manner in which Russell, the actual purchaser, paid for the land and by other circumstances, that Enderton & Co. must have been interested. I think that all these matters, although tending to raise suspicion, were sufficiently explained by the defendants. I agree with the trial Judge in finding that the plaintiffs completely failed to establish this branch of the case.

The next allegation is that, during the negotiations for purchase, Enderton and Shepard, through their representative or agent, concealed from the plaintiffs the facts in relation to the proposed purchase by the Hudson's Bay Company and the probability of an increase in the value of the plaintiffs' property. But the evidence proves that Russell was the actual purchaser, that he, acting in his own interests and not for Enderton & Co., personally conducted the negotiations with the plaintiffs, and that he took from them the option in the name of Enderton & Co. intending to use it for his own benefit. The action must, therefore, fail as against Enderton and Shepard.

As against the defendant Russell, the first allegation is that he, falsely representing that he was an employee or agent of Enderton & Co., falsely represented to the plaintiffs that the said Bell wanted to buy the land, whereas in fact Russell was buying for himself. This is followed by allegations that the plaintiffs, relying on the said representation, gave the option above referred to, that Bell was "a mere straw man" whose name was used to deceive the plaintiffs and conceal the fact that Russell was the real purchaser, and for the purpose of avoiding the giving of a covenant. As, however, the option was taken in the name of Enderton & Co. and the name

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of Bell was only mentioned and not actually used, nothing can be founded upon these allegations.

The next allegation sets forth that the plaintiffs, in assumed pursuance of said sale, upon receiving the cash payment less the $1,000 commission, conveyed the land to the defendant Simpson. There are the further allegations that Simpson was a man of little means, that the purchase money was advanced by Russell, that he was the real purchaser and that the transfer of the land was taken in Simpson's name for the purpose of avoiding a covenant on the part of Russell, and to conceal that the latter was the real purchaser. It is then averred that, if the plaintiffs had known that Russell was the real purchaser, they would not have sold the land to either him or Simpson.

This involves consideration of the question whether the sale can be avoided by the plaintiffs on account of the concealment of the name of the real purchaser, where, as it is alleged, the vendors would not have sold if they had known who the real purchaser was. "The law seems now to be that where one person is deceived as to the real party with whom he is contracting, and that deception either induces the contract or renders its terms more beneficial to the deceiving party or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him; but that, where none of these circumstances can be shown to follow from the deception, the contract may be enforced": *Fry on Specific Perf.*, 5th ed. 107, citing *Fellowes* v. *Gwydyr*, 1 Sim. 63; 1 R. & My. 83. That statement of the law applies only while the transaction is *in fieri* and to proceedings for specific performance, the affording of relief in such a case being in the discretion of the Court. But, where a conveyance has been executed and delivered, nothing in the way of misrepresentation short of actual

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positive fraud will warrant a judicial rescission between vendor and purchaser: *Bell* v. *Macklin,* 15 S.C.R. 576, 581; *Brownlie* v. *Campbell,* 5 A.C. 925. The plaintiffs, in order to set aside the conveyance, would be bound to establish fraud to the same extent and degree as in an action for deceit. The misrepresentation in the present case was not shown to have been material. There was no evidence produced, when the plaintiffs were proving their case, to show that they would not have conveyed to Simpson if they had known that Russell was the real purchaser. The vague statements made by one of the plaintiffs in rebuttal cannot be accepted as proof of this portion of the case.

The last allegation to be dealt with is that Russell falsely represented to the plaintiffs that "he knew of nothing doing up in the vicinity of the property in question herein," and concealed from the plaintiffs the knowledge that he had of the active movement in the neighbouring properties. There is no allegation that Russell was the plaintiffs' agent and there is no evidence whatever to support such an allegation. Both plaintiffs considered that he was acting for the purchaser and not for them. The plaintiffs, it is true, agreed to pay Enderton & Co. a commission on the sale and this commission, unknown to them, went to Russell. They and Russell, as the evidence shows, were at arms length during the negotiations. As Michael Kelly admits, Russell was endeavoring to secure the best terms he could get and the plaintiffs were trying to do the best possible for themselves. The allowance of the commission to Enderton & Co., the holders of the option, seems to me to have been more in the nature of a concession made as a part of the transaction itself, than of a remuneration from a principal to an agent. Only a four days' option to purchase was given as a result of the negotiations between the parties. No commission was earned for

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securing the option. It was only on a sale going through that a commission became payable. The fact relied upon to establish the relation of agency did not take place until after the negotiations were concluded and the alleged misrepresentations or concealments made. If Russell had not exercised the option no commission would have been received and there would not have been a tittle of evidence to support the contention as to his agency. Receiving the amount of the commission, through the generosity of Enderton & Co., after the sale had been completed did not constitute him the agent of the plaintiffs, or create a fiduciary relationship towards them.

I agree that the appeal should be dismissed with costs.

CAMERON, J.A. The learned Chief Justice, who tried this action, held that neither Enderton nor Shepard bought the property in question and that neither of them ever had any interest therein. The evidence is overwhelmingly in support of that finding, and it would appear to me out of the question to disturb it.

The defendant Russell was not originally a party to the action. The allegations with reference to him in the statement of claim are in the following paragraphs:

I. Paragraph 2, wherein Russell's occupation and residence are stated.

II. Paragraph 4 alleges knowledge on the part of all the defendants that certain property on Portage Avenue was "under option" and that a large business concern was about to purchase it, thereby enhancing its value.

III. Paragraph 3 alleges that Russell represented to the plaintiffs "that he was from the office of the defendants C. H. Enderton & Co.," knowing that the plaintiffs understood from that fact that he was an employee of Enderton & Co. and intending that they should so believe, and represented falsely that he was acting as agent of that firm for the purpose of purchasing the

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property for one Bell, who wanted to buy the same, whereas Russell intended to purchase for himself.

IV. Paragraph 14 alleges that Russell retained the signed option.

V. Paragraph 16 alleges that the plaintiffs received the cash payment of $25,000 "less $1,000 deducted by the said firm of C. H. Enderton & Company * * * for the said defendant Russell for commission as aforesaid, which said commission was retained * * * by the defendant Russell."

VI. Paragraph 17 alleges that, while the conveyance was made to Simpson, the purchase money was advanced by Russell and the transfer was taken in Simpson's name, to deceive the plaintiff as to Russell's identity as purchaser and to avoid giving a covenant for the unpaid purchase money.

VII. Paragraph 18 alleges that the plaintiffs were ignorant that Russell was the purchaser or they would not have sold to him.

VIII. Paragraph 19 alleges that Russell "falsely represented to the plaintiffs that he knew of nothing doing up in the vicinity of the property in question herein." Also that Russell concealed his knowledge of the options aforesaid, of the "prospect of a forward movement in real estate" and of the purchase by a large business concern of a block of land near the property involved.

I have set out above the allegations of the statement of claim which affect the defendant Russell, and upon which relief against him is asked. Upon consideration it seems to me that these allegations disclose no cause of action. It is nowhere alleged that Russell was agent for the plaintiffs. The allegation as to the representation made by him in paragraph 3 is directly to the contrary, viz: that he came from Enderton & Co.'s office and was acting as their agent to purchase for Bell.

The allegations in paragraphs 17, 18 and 19 are im-

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material in the absence of any allegation that there was a duty on Russell's part toward the plaintiffs to do the things he is stated to have failed to do, or not to have made the representations he is alleged to have made. I find it difficult, in fact impossible, to attach any precise meaning to the allegation in paragraph 19 that Russell "falsely represented to the plaintiffs that he knew of nothing doing," etc.

As to the allegations in paragraph 16. The allegation here is (so far as it affects Russell) that Enderton & Co. deducted from the purchase money $1,000 for Russell for commission "as aforesaid." This commission is referred to in three previous paragraphs of the statement of claim. (1) In paragraph 7, where it is stated "the plaintiffs agreed to pay the said firm of C. H. Enderton & Company a commission of $1,000 for effecting such sale." (2) In paragraph 9 it is alleged that the plaintiffs, "upon receiving the cash payment of $25,000, less $1,000 deducted for the said commission," conveyed the said land, etc. (3) In paragraph 14 it is again alleged that the plaintiffs agreed to pay Enderton & Co. a commission of $1,000 for effecting such sale. So that we must read the above allegation in paragraph 16 as follows: "$1,000 deducted by Enderton & Co. for the defendant Russell for commission agreed to be paid by the plaintiffs to Enderton & Co." Now this, if it means anything, means that Enderton & Co. deducted commission agreed to be paid to them by the plaintiffs for the benefit of Russell or, in other words, made a gift of that sum to Russell. What there is in this for the plaintiffs to complain of I cannot see.

I examine these allegations with strictness because it is upon the allegations in paragraph 16 that Russell's agency must depend. There is nothing alleged to constitute the relation of agency except the payment of the commission as set forth above. If that commission was

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agreed to be paid, not to Russell but to Enderton, and was given voluntarily by Enderton to Russell, that is something not affecting the plaintiffs in any way, and wholly failing to raise any question of a fiduciary relationship between the parties.

Apart from this view of the pleadings, I think the evidence of the plaintiffs is conclusive as to the relationship existing between them and Russell. They clearly looked upon him in no other light than as agent for an intending purchaser. The negotiations between them were plainly at arms' length. Even if the allegations in the pleadings had been sufficiently wide to cover the grounds urged on the argument, it seems to me, under the circumstances and in view of the evidence, that the payment to Russell of the $1,000 or the allowance to him of that amount on account of the purchase money, in whatever mode it may be regarded, is not sufficient, of itself, to constitute a confidential and fiduciary relationship between the parties such as would vitiate the transaction involved.

I think the judgment appealed from should be affirmed with costs.

HAGGART, J.A., concurred with the majority of the Court.

Appeal dismissed.

[Appealed to the Privy Council.—Ed.]

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BEARS v. CENTRAL GARAGE CO.

Before MACDONALD, J.

Negligence—Fire—By-law of municipality—Liability to private person for contravention of.

The violation of a statutory or valid municipal regulation established for the protection of the public will not give a right of action to a private person whose property is damaged or destroyed in consequence of it. It is only when such statute or by-law is established for the benefit of private persons, and other elements of actionable negligence concur, that a person belonging to the protected class may base his action in part upon such violation, which, in that case, constitutes negligence in itself.

The trial Judge in this case found no evidence of anything having been done or left undone by the defendants to constitute a breach of the City by-law as to the storing and handling of gasoline, and no evidence of negligence on the part of the defendants otherwise, and held that they were not liable in damages to the plaintiff for the destruction of his motor car by a fire which broke out in their garage.

DECIDED: 3rd May, 1912.

Statement. THE defendant Company was incorporated and licensed under the laws of the Province of Manitoba to buy and sell motor cars and to carry on a general motor car business, and had a garage in the City of Winnipeg in which they rented floor space, or stall room, to their customers.

The plaintiff rented from this Company stall room for his motor car, and on the 17th day of May, 1911, the garage was destroyed by fire, and the motor car of the plaintiff then in the garage was also destroyed, and the plaintiff brought this action claiming damages against the defendant Company, charging the Company with negligence resulting in the destruction of his car.

N. F. Hagel, K.C., for plaintiff.

A. E. Hoskin, K.C., and *J. W. E. Armstrong* for defendants.

MACDONALD, J. The plaintiff was in the chauffeur's room in the destroyed building on the night of the fire and saw the fire almost in its inception, but he could

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not say how it got started. A gasoline tank, which was underground, was being filled at the time from a tank wagon in the building, the gasoline being carried from the tank wagon to the underground tank in buckets of five gallon measure. The building was lighted by electric light and how the fire originated is a mystery.

After evidence was adduced establishing the above facts and after a motion for a non-suit, the plaintiff's counsel asked leave, and was permitted, to put in evidence By-law No. 4283 of the City of Winnipeg, and on the facts as stated urged that the plaintiff, apart from this by-law, was entitled to a verdict as there was evidence of a want of reasonable care on the part of the defendants in handling a dangerous explosive and such lack of reasonable care as would constitute sufficient negligence to render them liable.

I cannot, however, find any evidence of want of reasonable care.

Gasoline was of necessity stored in the underground tank for the convenience of the plaintiff and other customers. There is nothing to show that the manner of storing it or the quantity thereof was not the customary one.

It was urged by Mr. Hagel, K.C., with much confidence, that a contravention of the by-laws referred to constituted negligence, but the case and authority subsequently cited by junior counsel do not support his contention.

It is laid down in *Deering on Negligence,* sec. 6, that, where a statute imposes a duty upon a person, a failure to perform this duty constitutes negligence in itself. "The failure of any person to perform a duty imposed on him by statute or other legal authority should always be considered evidence of negligence or of something worse," and in support of this the author cites *Shearman & Redfield on Negligence,* sec. 13: This latter applies only

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to violations of a statutory or valid municipal regulation established for the benefit of private persons where the action is brought by a person belonging to the protected class and only if other elements of actionable negligence concur.

Here there is no evidence of anything having been done or left undone by the defendants to constitute a breach of the by-law and therefore, even if a contravention constituted negligence, which I think it would not, there is no evidence of such, and there is no negligence proved.

Furthermore, there is no evidence of the damages sustained. The plaintiff says that the car cost him $1,800 in June of 1910, and that it had been run since then for general hire in the plaintiff's livery business, and at the time of the fire the plaintiff says he would not put a value on it.

The plaintiff has failed to make out a case, and I dismiss his action with costs.

TORONTO CARPET CO. v. WRIGHT.

Before ROBSON, J.

Fraudulent conveyance—Evidence—Corroboration—Injunction—Guaranty—Husband and wife—13 Eliz. c. 5—Voluntary settlement.

Motion for an interim injunction to restrain the defendant Mary Wright from disposing of certain shares of stock in certain companies which the plaintiffs alleged had been assigned to her by her husband, against whom the plaintiffs had a judgment, with intent to defeat and delay his creditors within the meaning of 13 Eliz. c. 5. The plaintiffs' judgment against him was founded on a guaranty which he had given prior to his assigning the shares to his wife and the circumstances were such that, if Wright owned the shares, it was probable that the trial Judge would infer an intention on his part to defeat or delay creditors under the statute.

The only evidence as to the ownership of the shares was that of Mary Wright herself given on her examination. As to the shares other than those in the Winnipeg Saddlery Company, the learned Judge found, on the evidence set out below, that the plaintiffs had not shown such a reasonable probability of their succeeding in the action

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as to justify an injunction before trial; but, as to the shares in the Winnipeg Saddlery Company, the evidence, also set out below, was such as to afford reasonable ground for plaintiffs' action.

Held, that the injunction should be granted in respect of the shares in the Saddlery Company, as it did not appear that there was any other property available to the creditors and, unless restrained, the defendant might at any moment put it beyond their reach.

Held, also, that the examination of the husband as a judgment debtor in other actions could not be used as evidence on such a motion.

When a person gives a guaranty for the debt of another, he is not entitled afterwards to make a voluntary settlement of any of his property unless he retains sufficient to pay the debt guaranteed and the fact that, when the settlement was made, the principal debtor had assets sufficient for payment of the debt cannot be regarded.

Re Ridler, (1882) 22 Ch. D. 74, followed.

DECIDED: 13th May, 1912.

Statement.

PLAINTIFFS recovered a judgment in his lifetime against Archibald Wright, deceased. They alleged that he assigned certain company shares to his wife, the defendant Mary Wright, with intent to defeat his creditors. Plaintiffs sought in this action the setting aside of the assignments under 13 Eliz. c. 5. The action was brought on behalf of themselves and other creditors of Wright. They so proceeded although they had recovered judgment against Wright. They applied for an injunction, till trial, restraining defendant Mary Wright from disposing of the shares. Archibald Wright was also named as a defendant. He died since action. No step had been taken thereupon.

H. M. Hannesson for plaintiffs.

W. R. Mulock, K.C., and *J. W. E. Armstrong* for defendants.

ROBSON, J. Although apparently the statement of claim has been served, defendant Mary Wright has not pleaded, this being by arrangement between solicitors. It is still quite open to plaintiffs to amend their statement of claim and constitute the cause as to parties as they may be advised. The question as to the interlocutory

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injunction is solely between plaintiffs and defendant Mary Wright. Her counsel oppose this application.

The evidence tendered in support of the application consists of two affidavits of plaintiffs' solicitor, the examinations of Archibald Wright as judgment debtor in suits of plaintiffs and other firms against him, and the examination of the present defendant.

I do not think the examination of Wright in other causes as judgment debtor may be referred to. In *Clinton* v. *Sellars,* 1 Alta. R. 135, at 153, Stuart, J., deals with the question. That was the trial of the action, but that, to my mind, does not affect the matter. Certain departures from the rules of evidence are permitted in interlocutory stages, but they do not go so far as to authorize the reading of depositions against another party in another cause. I do not think the rule permitting affidavits of information and belief provides a means of introducing such testimony. The affidavit epitomising the examinations does not even come within that exception or advance the proof at all.

It is alleged in the statement of claim that Wright was given credit by plaintiffs on the faith of his owning the shares. There is no evidence to support this on this application.

That judgment was recovered on 11th October, 1911, by plaintiffs against Wright for $15,000, and interest as alleged in the statement of claim, is shown by one of the affidavits. This was not a ground of contention nor was the fact that the liability on which the judgment was founded was an agreement of guarantee of 6th October, 1906, as specified in the statement of claim. As I read clause 2 of the affidavit of 1st May it proves that the obligation so sued on existed at the time of the stock transfers now impeached.

Mary Wright claims that all this property belonged to her and that her husband was a trustee for her, the

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transfers being made pursuant to her demand. That Wright certainly had nothing else clearly appears from Mary Wright's examination.

In *May on Fraudulent Conveyances*, 3rd edition, p. 36, appears the following:

"A guarantee given by a person who settles the bulk of his property must be regarded as a contingent liability, against which available assets should be provided in order to support such settlement. For the guarantee must be viewed as if the event had already happened—the possibility of which the parties must have had in contemplation when the guarantee was given—of the debtor being unable to pay; and the fact that, when the settlement was made, the principal debtor had assets sufficient for payment of the debt cannot be regarded. The state of the assets of the guarantor is the question which the Court considers. The guarantee must not be regarded as a liability which might never become a debt." *Re Ridler*, 22 Ch. D. 74, is referred to.

I think that, under the circumstances as they appear from even the meagre evidence adduced, if in fact Wright owned the property, it is more than possible that under *Re Ridler* a trial Judge would infer an intention on Wright's part to defeat or delay creditors within the meaning of the statute.

While it is undesirable at this stage to enter into any discussion of the merits, nevertheless this application must be disposed of, and that necessarily involves some reference to the facts as revealed by the evidence adduced.

The shares other than those in the Winnipeg Saddlery Company stand in a different position from the latter.

The only evidence of the circumstances of Mary Wright's interest in any of the shares is found in her examination. I have for present purposes to accept it equally for her as against her. I deal firstly with the shares other than those in the Saddlery Company.

Mary Wright asserts that these shares were bought

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with her money derived from the sale of certain land referred to by her. Her statement that she had owned the land for a long period prior to plaintiffs becoming creditors of Wright is not contradicted. Nor is it questioned that she herself received the consideration for the land in the form of a cheque payable to her. Thus I infer that the title was in Mary Wright. These allegations were readily open to contradiction by plaintiffs should the facts really have been otherwise, and on this application I therefore assume them to be true. From her evidence, and that is all there is to consider, it cannot be inferred that her handing over the cheque to her husband was a gift. On the present material it seems that she intrusted the money to her husband for investment in her behalf. As to the stocks purchased with the land moneys I do not think the plaintiffs have so far shown such a reasonable probability of their succeeding in this action as to justify the Court in interfering with the property before trial.

The shares in the Winnipeg Saddlery Company stand in a different position.

It seems that the business, which has developed into this Company, was commenced years ago by Archibald Wright. His wife's claim is described by her as follows:

"Well, I boarded the men in the shop and done their washing and I worked for the shop. I had a sewing machine and used to work for the shop, and he thought I was entitled to something for my work, and I got the shop and he took the Leland and the business up west, and I took the farm and the shop, and the shop was no good."

When the present Company was formed the shares in question were recorded in the name of Archibald Wright. They were transferred by Wright to his wife after he had given plaintiffs the guarantee. There are no independent circumstances such as existed in reference to the other shares by which this claim can be tested. It

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is evidently, as to the shares in the Saddlery business, a case for the application of the rule requiring corroboration in transactions between relatives where strangers are affected thereby. It will likely also be a serious question whether this was not an attempt at a gift and whether there was such a delivery of possession as would be necessary to effectuate it. I am of opinion that as to the shares in the Saddlery Company there are reasonable grounds for plaintiffs' action.

It was contended that owing to delay plaintiffs should fail on this application. An injunction had been obtained *ex parte* in January last. The motion to continue it came before me recently. The injunction was dissolved by me and leave given to bring this application. Perhaps instead of dissolving the injunction I should have given leave to supply material relatively unimportant. A portion of the period since plaintiffs recovered judgment is thereby accounted for. In any event I do not think it is a case in which it should be held that owing to any delay that has taken place this temporary relief should be denied.

It does not appear that there is imminent danger that the shares in the Saddlery Company will be disposed of and lost to plaintiffs if the injunction does not issue. In case of a continuing wrong or a threatened trespass it may be necessary to show some overt act before resorting to this procedure. In circumstances such as the present nothing might be known till the act to be restrained were done and the shares irretrievably lost. It may be that these shares will be the only property available to the creditors, and if so it is important that they be preserved to them.

I would in this case exercise my discretion towards granting the injunction as to the shares in the Saddlery Company. Otherwise the application is dismissed. Costs reserved for disposition by the trial Judge.

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RE KOOTENAY VALLEY FRUIT LANDS COMPANY.

Before MATHERS, C.J. K.B.

Mortgagor and mortgagee—Interest—Winding-up of Company—Payment of the mortgage money.

By the terms of a mortgage from one Cooper to the Company, it was provided that all payments upon it should be duly made if paid to the credit of the mortgagee at the Eastern Townships Bank of Canada, Winnipeg, Manitoba.

The solicitors of the mortgagor paid the full amount due under the mortgage into the Bank by a certified cheque indorsed for deposit to the credit of the Company; but, owing to information they had as to dissensions amongst the directors of the Company and as to there being two sets of officers, they attached a letter instructing the Bank to hold the money until certain conditions were fulfilled including, amongst others, an assignment or discharge of the mortgage assented to by every shareholder who had or might have any interest in the Company. Shortly afterwards, an order for the winding up of the Company was made and a permanent liquidator appointed.

Held, that the mortgagor had not paid the money in accordance with the provision quoted and was liable for interest on the amount up to the date of its actual receipt by the liquidator and at the rate specified in the mortgage.

A mortgagor has no right to stipulate that the money shall not be handed over until a discharge, together with the title deeds, is handed over.

Peers v. *Allen*, (1872) 19 Gr. 98, and *Lacey* v. *Waghorne*, (1888) 59 L.T. 208, followed.

It was not the duty of the liquidator, on his appointment, to execute a discharge of the mortgage and take the money into his custody as being property and effects of the Company; for, under the circumstances, the money was not property of the Company available for the liquidator and, in any case, by the terms of the letter of instruction to the Bank, he could not have got the money if he had tendered only a discharge executed by himself.

DECIDED: 17th May, 1912.

Statement. TRIAL of an issue directed by the Court of King's Bench, the question to be tried being whether or not the liquidator was entitled to demand and receive from James Cooper interest upon a mortgage made by Cooper in favor of the Kootenay Valley Fruit Lands Company, dated February 2nd, 1908, from September, 7th, 1911, being the date when certain moneys were paid into the

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Eastern Townships Bank on behalf of Cooper, and intended by him to be in payment of the mortgage moneys, until the liquidator actually received the moneys, and, if so, what the rate of interest should be.

F. M. Burbidge and *V. Gordon* for Cooper.

E. Anderson, K. C., for liquidator.

H. E. Swift for contributories.

MATHERS, C.J.K.B. Before the Company went into liquidation it sold a large block of land situate in British Columbia to James Cooper, of Saginaw in the State of Michigan, who gave a mortgage back to the Company for $75,000. After providing for payment of this sum on specified dates and in specified instalments, with interest at six per cent per annum, the mortgage contained this clause: "All payments herein provided for shall be duly made if paid to the credit of the mortgagee at the Eastern Townships Bank of Canada, Winnipeg, Manitoba."

On the 7th of September, 1911, there was due under this mortgage the sum of $49213 and on that date the mortgagor's solicitors sent to the Eastern Townships Bank their certified cheque for that sum (plus $10 to cover costs of assignment or discharge), endorsed for deposit in the bank to the credit of the Kootenay Valley Fruit Lands Co., Limited, to which was attached a letter of instructions.

The Bank accepted the money and deposited it to the credit of the Company, the terms of such deposit being shown in a deposit slip dated September 7th, 1911: "Credit Kootenay Valley Fruit Lands Co., Limited, $49,223 subject to endorsement on undermentioned cheque and letter attached thereto." The letter contains a statement of the manner in which the amount paid in is arrived at, and then proceeds as follows:

"Before the Company is permitted to withdraw this money from your Bank or to make any use of same, you will kindly furnish us with an assignment of this mort-

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gage from the Company to D. W. Briggs, of the said City of Saginaw in the State of Michigan, lumberman, in accordance with the by-law or resolution passed by the Company on the 24th day of April, A.D. 1911, or, if it should appear that Mr. Briggs is not entitled to such an assignment, or for any other reason the Company declines to furnish such an assignment, then the Company is not to be permitted to withdraw or use the said moneys without furnishing us with proper discharge of the said mortgage and handing over to us, together with such assignment or discharge, all title deeds and documents of title in respect of the lands mentioned in the said mortgage. As to these title deeds we understand they are in the possession of one William Smith who claims some right to them as equitable mortgagee, or otherwise. We are further informed, principally by Mr. J. T. Huggard, that The Kootenay Valley Fruit Lands Company, Limited, is in a somewhat disorganized condition, that there are apparently two sets of officers, that there are dissensions amongst the members of the Company, that there are questions as to the validity of alleged transfers of the shares issued by the Company, and other difficulties in regard to the Company that make it very important for your protection and for our protection that these moneys should not be withdrawn from your Bank until you are thoroughly satisfied that you have proper authority from the Company to permit them to be withdrawn, in fact we think under the circumstances that you ought to have either a resolution of the shareholders of the Company passed unanimously, or at all events some consent or release from each shareholder of the Company before taking the responsibility of allowing these moneys out of your hands. So far as we are concerned, and from information we have received about the disorganized state of the Company, we would not be satisfied with any assignment or discharge of the mortgage which was not assented to by every shareholder of the Company who has, or may have, some interest in the Company."

On the 5th of October, 1911, an order was made for the winding up of the Company and on that date a permanent liquidator was appointed.

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It was stated on the argument that the liquidator upon his appointment applied to the Bank for this money, but was refused because the conditions in the letter were not complied with. The question for decision is whether or not the liquidator is entitled to interest upon the money after it was paid into the Bank, and, if so at what rate and for what period.

The mortgagor contends that the money was paid into the Bank in accordance with the terms of the mortgage and that the letter accompanying the cheque imposed no condition that he was not by law entitled to impose. I cannot agree with this contention. I think the fair reading of the letter of instructions to the Bank is that the Bank was to hold this money as a trustee for the mortgagor until the Company delivered to the mortgagor's solicitors an assignment of the mortgage to one D. W. Briggs, or a discharge thereof assented to by every shareholder of the Company who has, or may have, some interest in the Company, and upon handing over to them therewith all title deeds and documents of title in respect of the mortgaged lands.

It appears that the mortgagor had not the right to stipulate that the money should not be handed over until a discharge of the mortgage together with the title deeds, was handed over: *Peers* v. *Allen*, 19 Gr. 98; *McKenzie* v. *McLeod*, 39 N.B. 230; *Lacey* v. *Waghorne*, 59 L.T.N.S. 208; but, even if he had such right, he was clearly going beyond the limit in insisting that the discharge be assented to by every shareholder "who has, or may have, some interest in the Company."

The payment to the Bank permitted by the mortgage was an unconditional deposit of the money to the credit of the Company. The mortgagor has not complied with this term of the mortgage and is in no better position than he would have been in had he kept the money in his own pocket.

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It is said, however, that, when the liquidator was appointed, it was his duty to at once execute a discharge, as he had power to do under section 33 of The Winding-up Act, and take into his custody this money as being property and effects of the Company. In my opinion this money was not property of the Company available for the liquidator. The mortgagor had made the Bank his trustee of the fund until the conditions which he imposed upon its payment were complied with. The liquidator had no greater right to insist upon its payment by the Bank than the Company itself had. He was not entitled, by the terms of the letter, to receive it on giving a discharge executed by himself. He could only obtain possession or control over it upon tendering a discharge executed in the manner stipulated for in the letter.

It may be that the mortgagor would have accepted a discharge executed by the liquidator and released the money if he had been so requested. I cannot say that the liquidator was under any obligation to tender such a discharge in order to relieve the mortgagor of the payment of interest. If the mortgagor wanted to stop interest running, it was his business to pay, or tender, the money. He has done neither. He has never withdrawn or modified the terms of his solicitors' letter of September 7th, 1911. In my opinion the mortgage moneys have not been paid or tendered, and interest is still accruing thereon at the rate specified in the mortgage and I so decide.

The liquidator is entitled to costs of the application.

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IN THE COURT OF APPEAL.

RE MCNICHOL AND WINNIPEG.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Arbitration and award—Winnipeg Charter, 1 & 2 *Edw. VII.*, *c.* 77, *ss.* 818,823—*Making submission a rule of Court—Objection not raised at trial—Order setting aside award but making no further provision—Compensation for property taken—Interest on amount awarded—Appeal to Court of Appeal.*

By-law No. 3649 of the City of Winnipeg provided for the extension of Ida Avenue across and through McNichol's property, and that one-third of the cost of the improvement should be charged against his lands. Pursuant to the by-law and the provisions of the Winnipeg Charter, it was referred to three arbitrators to determine the compensation payable to McNichol for the land taken or injuriously affected by reason of the extension of the street.

McNichol appealed from the award of these arbitrators, which allowed him $6,210, to a Judge of the King's Bench, when an order was made, under section 823 of the Charter, remitting the matter to the consideration and determination of P. A. Macdonald. Afterwards Mr. Macdonald made his award fixing the compensation payable to McNichol at $5,710, and setting forth the reasoning by which he arrived at that conclusion.

McNichol again appealed, whereupon Metcalfe, J., made an order setting aside Mr. Macdonald's award, but making no provision for determining the matter or referring back the award. McNichol then appealed to this Court from said last mentioned order and asked that the amount awarded to him be increased.

Held, (1) An appeal lay to this Court against the order, notwithstanding the absence of any provision in the Charter for such an appeal.

(2) This Court should not give any effect to the objection of want of jurisdiction in the King's Bench to deal with the award because there had been no order making the submission a rule of Court, such objection, even if valid, not having been raised at the hearing before the judge.

(3) The order appealed from was wrong in that it simply set aside the award and made no provision for determining the matter or for referring back the award.

(4) The by-law not having been impeached, the referee was right in refusing to allow anything to McNichol in respect of the charge of one-third of the cost of the improvement imposed by it upon McNichol's property.

(5) Upon the merits and having regard to the provisions of section 818 of the Charter and to the evidence that had been adduced, the amount that had been awarded by Mr. Macdonald was not shown

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to be incorrect, and his award should be restored and the order appealed from set aside with costs.

(6) Even if the arbitrators had any power, under section 818 of the Charter, to add interest from the date of the by-law, this was not a case in which such power could be properly exercised.

DECIDED: 20th May, 1912.

Statement

APPEAL from an order setting aside an award.

By-law No. 3649 of the City of Winnipeg, to provide for the extension of Ida Avenue across lot 71 St. James, was passed January 22, 1906. Pursuant to that by-law it was referred to J. T. Latimer for the City, W. M. Fisher for A. R. McNichol and W. J. Christie, the third arbitrator named by the other two, to determine the compensation payable to McNichol in respect of that portion of lot 71 owned by him and taken by the City, or injuriously affected by reason of the extension of the street.

Latimer and Christie, after hearing the evidence, made their award June 30, 1909, fixing the compensation at $6,210, as of January 22, 1906, the date of the by-law. Fisher did not join in the award, holding McNichol entitled to a much larger sum. From that award McNichol appealed to Metcalfe, J., who, on May 3, 1910, made an order remitting the matter to the consideration and determination of P. A. Macdonald, under section 823 of the Winnipeg Charter, with power to act upon the evidence already taken and, in addition, to hear any further evidence he might deem necessary.

July 20, 1910, P. A. Macdonald made his award fixing the compensation payable to McNichol at $5,710. He set forth in a schedule to it the reasons influencing him in coming to that conclusion.

From that award McNichol once more appealed to the Court of King's Bench, whereupon on September 26, 1910, Metcalfe, J., made an order setting aside the award and making no other order except further to reserve the costs of the various proceedings.

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From that order McNichol appealed to this Court asking that the order be reversed, or varied, and that an increased amount be awarded to him.

J. B. Coyne and *J. P. Foley* for appellant cited *Re Pryce and Toronto*, 20 A.R. 16; *Re Pattullo and Orangeville*, 31 O.R. 192; *Herrman* v. *Owen Sound*, 16 O.W.R. 98; *Christie* v. *Toronto Junction*, 22 A.R. 21; 25 S.C.R. 551; *Re Birely* and *Toronto, H. & B. Ry. Co.*, 28 O.R. 468, and *Re Macpherson* and *Toronto*, 26 O.R. 558.

T. A. Hunt for the City of Winnipeg cited *Re Byerley and City of Winnipeg*, 20 M.R. 441; *Johannesson* v. *Galbraith*, 16 M.R. 138; *Dawson* v. *Sadler*, 1 Sim. & S. 537; *Calgary* v. *MacKinnon*, 43 S.C.R. 379, *Lemoine* v. *Montreal*, 23 S.C.R. 392; *Re C. N. R.* and *Robinson*, 17 M. R. 404; *Manufacturers Ins.* v. *Atwood*, 28 U.C.C.P. 21; *In re York* and *Wilson*, 8 P.R. 313, and *Crain* v. *Ottawa*, 43 U.C.R. 498.

HOWELL, C.J.M. The by-law No. 3649 taking the property of the plaintiff for the opening of the street fixes the proportion of the cost of the property which shall be charged upon the adjacent lands assumed to be benefited. About one-third of the cost the by-law charges upon the plaintiff's lands and the other two-thirds is charged upon other lands. This by-law is not impeached and we have nothing to do with the question whether or not the others have been let off too cheaply. It is admitted on both sides that the plaintiff's land is of little value unless it is subdivided into city lots, and in order to subdivide it the plaintiff must comply with the law. When he bought the property the River was as now on the south side of the property and the adjoining and abutting streets as they now exist were then highways vested in the City. It is not the fault of the City that the peculiar shape of the land does not permit it to be

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laid out advantageously in harmony with existing streets as the plaintiff claims.

It seems to me the City would be acting properly if, upon a submission by the plaintiff of a plan for subdivision of this land, they required him to dedicate a street to the public in the identical place where the street in question has been placed and, if he had done this in order to subdivide his property, he would not have received any recompense and the adjacent holders would not have been called upon to pay any portion of it.

As above mentioned a subdivision will greatly enhance the value of the plaintiff's land, but the right to subdivision and the placing of streets which the City must take care of and for which they are responsible is subject to their control and so the plaintiff must lay out the streets by the consent of the City or must leave his land unsubdivided.

I cannot keep from my mind my knowledge of the locality and it seems to me beyond question that this tract of land, unsubdivided as it now is, with the street now taken from a part of it, is much more valuable than it would be if it remained as it formerly was without having lost the area taken for this street, and in that view of it the plaintiff has rather gained than lost by the action of the City.

Looking at it from another aspect, I think the plaintiff cannot complain, for I think the balance of the tract can be readily and profitably subdivided in harmony with the street in question, and I think the City's suggestion for subdivision would make the property more valuable to the plaintiff than the way he suggests. The new street gives to the plaintiff a street sixty-six feet wide along the north side of his property a portion of the way and then through the remainder, and thus gives the property access to a long and prominent street, and a portion of the land for this street is contributed by the

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owner on the north side and in addition he gets by the award of Mr. Macdonald the sum of $3,556.67 over and above any charge upon his land.

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I think Mr. Macdonald's award grants to the plaintiff the due compensation provided for by section 774, and it seems to me that the rules laid down by section 818 have been followed.

The plaintiff's counsel argued at length that there was damage to the triangle of the plaintiff's land which was left on the north side of the street, but the question is not one as to the increase or reduction in value of this triangle; the question is as to the effect of this street upon the value of the whole tract of land belonging to the plaintiff, and I think, on this ground, the plaintiff has no cause to complain of Mr. MacDonald's award.

Our statute is quite different from the Ontario statute and I see no reason for any discussion of the Ontario cases.

If the points had been raised in argument I can see many difficulties in the way, many of which are discussed in the judgment of my brother Cameron, which I have had an opportunity of reading; but, as counsel on both sides have asked for a decision on the merits, I have not considered them.

Professional testimony was given on both sides but, as usual, each swore in favor of the side on which he was called. My own observation and knowledge of the locality harmonizes as to value with that of the arbitrators.

I would set aside the judgment of Mr. Justice Metcalfe and restore Mr. Macdonald's award as to the amount payable to the plaintiff. The plaintiff should get the costs of the arbitration proceedings before Mr. Macdonald and the costs of this appeal.

PERDUE, J.A. An objection on behalf of the City was taken before this Court that no rule or order had been

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obtained making the submission a rule of court, as a foundation for the proceedings by way of appeal. This objection was not taken before Metcalfe, J., and in my view no weight should be given to it by the Court of Appeal. The questions raised in the Court of King's Bench were dealt with by the Judge before whom they were argued, both sides taking it for granted that these questions were properly before the Court. We might well assume that under such circumstances the omission of a formal preliminary step had been waived. In any event, an order had been made by Metcalfe, J., on 3rd May, 1910, remitting the award of the three arbitrators to Mr. Macdonald, who was appointed arbitrator under the provisions of section 823 of the City Charter. That order was duly issued by the Court of King's Bench. No objection was made to the order; it was acted upon by both parties and an award was made in due course by the arbitrator in pursuance of it. On an appeal from his award the order was pronounced which is the subject of this appeal. I think that the matter was sufficiently before the Court, the submission to Mr. Macdonald being in fact by an order of the Court.

I think the order appealed from was wrong in that it simply set aside the award and made no provision for determining the matter submitted to the arbitrator or for referring back the award. Two awards have already been made on the material before the Court. It would be difficult for this Court to make an award upon the same material which would deal satisfactorily with the amount of compensation to be paid. To remit the matter to the same or other arbitrators would involve great additional expense. I was impressed with Mr. Coyne's argument that the amount of compensation should be increased, but, on reflection, I have come to the conclusion that Mr. Macdonald's award has done substantial justice. It differs but little in amount from

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that arrived at by a majority of the original board of arbitrators. That the two awards so nearly agree in the findings is some ground for believing that the compensation allowed is not far wrong.

I think the order of Metcalfe, J., should be reversed and the award of Mr. Macdonald restored. The City should pay the costs of the appeal, and also the cost of the proceedings before Mr. Macdonald.

CAMERON, J.A. The principal points of objection taken to Mr. Macdonald's award were as follows:

In the first place it is urged that he was in error in not allowing, in addition to the damage awarded, the amount of assessment charged against the property for the cost of the work.

Next, Mr. Macdonald erred in not allowing substantial damage for the awkward shape of the triangle left on the property according to the plan Ex. 10. Mr. Macdonald held this was, in view of the surroundings, unavoidable.

Third, damage was done to the property by reason of the street cutting diagonally through the property on its south side.

Fourthly, the distance between Ida Avenue, as it is, and the top of the river bank is so shortened that the property cannot now be subdivided to advantage. This is a damage to the whole property for which allowance should be, but has not been, made.

It was further urged that McNichol is entitled to interest since the date of the by-law, and to the costs of all the arbitrations and other proceedings. The original offer of the City was $4350.

Objection was taken by Mr. Hunt that this appeal was not properly before this Court, there being no express provision for such under the Winnipeg Charter. But the order appealed from must, like other orders and decisions of Judges of the King's Bench, be subject to the appellate

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jurisdiction of this Court under section 58 of the King's Bench Act.

It is further objected that Mr. Justice Metcalfe had no jurisdiction to entertain the application made to him. The point is that, before the motion to set aside the award was made, the submission or proceedings upon which the award was based should have been brought into Court and made a rule of Court upon an application by motion for that purpose. This was no doubt the well-defined practice. "The jurisdiction to set aside an award, in old times, whether at Common Law or under the statute of William III, could alone be exercised on motion made for that purpose openly in the Court of which the submission had been made a rule" : *Russell on Arbitration*, (ed. 1891) 653. The remedy by action or suit, always available in the Court of Chancery (save in cases coming within 9 & 10 Wm. III, c. 15, Russell, p. 695) still exists in full force.

The provisions with reference to the powers of the Court to deal with awards on motion, prescribed by Rule 773 of the King's Bench Act, were applicable only for the purpose of enforcing awards. By Rule 774, it was provided that "The former practice with respect to awards shall not be abolished, but the same shall only be followed by special leave of the Court or Judge." These rules have been repealed by 1 Geo. V, c. 13, s. 2 (which came into force November 1, 1911); but such repeal does not affect any right acquired, duty imposed or liability incurred before the coming into force of the repealing Act, "or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability, right or duty." Is this a legal proceeding or other remedy to ascertain or to enforce a right acquired, duty imposed or liability incurred prior to November 1, 1911? Originally the proceedings were instituted to ascertain

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McNichol's right to compensation, and they have not lost that character. Therefore, the provisions substituted for rules 773 and 774 by section 1 of chapter 13, 1 Geo. V, are not in force so far as this proceeding is concerned, and we have it that the old practice with respect to awards is, for these present purposes, still subsisting.

As we have seen, the old jurisdiction of the Court to deal with awards could only be exercised on motion when the submission has been made a rule of Court. Section 823 of the Charter does not abrogate this requisite. "Every award * * * shall be subject to the jurisdiction of the Court of King's Bench, as if made on a submission * * * containing an agreement for making the submission a rule of * * * Court."

It is the submission that is to be made a rule of Court. Here there is no submission. The arbitrators are appointed under sections 796 *et seq.* "Either party may appoint an arbitrator." A written appointment is not necessary except that the City must surely act by by-law. But if the appointment be by the Mayor it may apparently be verbal. Notice of the appointment must be in writing, however. (sec. 798). Under the Lands Clauses Consolidation Act, 1845, sec. 25, the appointment of an arbitrator "shall be deemed a submission to arbitration": *Russell,* 584. There is no provision similar to this in the Charter. So here we are without any submission and without any statutory provision making the appointment of the arbitrators or any other proceeding equivalent to a submission. How then is the Court (no action having been brought either to enforce or set aside this award) to acquire jurisdiction over it and the parties to it?

It was the express intention of the Legislature that the Court of King's Bench should have summary jurisdiction. This clearly appears from section 823 and from

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section 827 also. And, in the absence of any definite provision as to the procedure, it would seem to me that the practice outlined by the Lands Clauses Act could be followed and the arbitrators' appointments considered a submission. Some authority for this is found in *Russell* at p. 589, where it is said that the practice under the Railway Clauses Act and other Acts would probably be analogous to that under the Lands Clauses Act. The objection to the jurisdiction was one not raised before Mr. Justice Metcalfe, but is raised before us for the first time. Had it been taken below it could have been met by an adjournment until the necessity for making the submission a rule had been complied with. That is only an *ex parte* proceeding after all. The lapse of time could not be considered as effective to prevent that step in view of such remedial rules as 341, 384 and 426 of the King's Bench Act. And if the Judge had such powers this Court certainly has, and I see no reason why they should not be exercised in this case.

The further objection that, inasmuch as Mr. Justice Metcalfe has exercised the powers set out in section 823, those powers are now exhausted, is met by the consideration already referred to that an appeal to this Court from the Judge's order does exist and that thereupon this Court has all the powers in said section set forth.

I wish first to consider the bearing upon this case of the principle laid down by Mr. Justice McLennan in *Re Pryce and Toronto,* 20 A.R. 24, and by Mr. Justice Street in *Re Richardson and Toronto,* 17 O.R. 491.

In the first place, there is no provision in the Ontario Act similar to section 818 in the Charter. There is section 437 practically identical with our 774. The meaning of the Ontario section is set out by Gwynne, J., in *Christie* v. *Toronto,* 25 S.C.R. p. 561. McLennan, J.'s, opinion at p. 24, in the *Pryce* case, is not founded on any provision of the Ontario statute, but solely upon

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the reasoning which there appealed to his mind as fixing a just method of arriving at the compensation. Now, in section 818, we have for the guidance of arbitrators the rules upon which they are "to proceed to appraise and determine the amount of the price, indemnity or compensation" when part only of the property is taken. They are to determine: (1), the intrinsic value of the property taken; (2) the increased value of the residue, and (3) the damage to the residue. And the difference between (1) and (2), or (1) and (3), "shall constitute the * * * compensation which the party * * * interested shall be entitled to." It is argued that the principles laid down in the cases arising under the Ontario Act are identically those set forth in 818. But there is no limitation in the Ontario Act such as we find in the latter. The arbitrators are told to find one thing and then another and the difference between the two "shall constitute the compensation." There is nothing said about, and there is no room for, taking into consideration the "land owner's share of the cost of the work." Justly or unjustly the Legislature has not permitted the arbitrators to take that element into their calculations. To put it in another way, had this award contained a provision adding the special assessment required to pay for the expenses of opening this street to the damages sustained by the owner, then it seems to me the award would have been open to attack on the ground that the arbitrators had exceeded their statutory powers. It must not be lost sight of, moreover, that the by-law, No. 3649, is not impeached in any way. It stands a valid by-law and now to give effect to the appellant's contention would be in fact to set aside or to ignore section 2 of that by-law. It would throw all the cost of the extension on the owners on both sides of Ida Street west of the extension provided for. My con-

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clusion is that I cannot see any way to interfere with the award on this ground.

As for the next objection, that the award makes no allowance for the triangle left as a consequence of the plan followed by the City, I am prepared, after a good deal of consideraion, to adopt the reasoning of Mr. Macdonald, that is to say, that, in view of the facts and circumstances naturally and properly influencing the action of the City authorities, and in view of the topographical surroundings, it was inevitable that a portion of the property should be left in this, or a similar, condition. The same considerations apply to the third and fourth grounds. As to none of these, as I think, a case has been made for increasing the compensation awarded.

Mr. Coyne pressed his client's claim for interest. But, even if there could be read into section 818 a power on the part of the arbitrators to give interest (which I consider at least doubtful), it does not appear to me that this is a case where it could be properly exercised.

I would set aside the order appealed from and restore the award made by Mr. Macdonald.

RICHARDS, J.A., concurred.

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SMITH v. ERNST (No. 1).

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Before ROBSON, J.

Jurisdiction—Service of statement of claim out of the jurisdiction—King's Bench Act, Rule 201 *(g)—Parties to action—Vendor and purchaser—Specific performance.*

When a vendor of land, under an agreement of sale, has conveyed the land and assigned the money payable by the purchaser to a third party, the purchaser may maintain an action against such third party for specific performance of the agreement, and the vendor is a proper, if not a necessary, party to such action.

Such third party had been duly served within the jurisdiction with the statement of claim in such an action. The agreement in this case was made, and the purchase money was to be paid, within the jurisdiction. The vendor of the land in question, which was in another Province, had ceased to be a resident of Manitoba when the action was commenced.

Held, that the statement of claim might, under paragraph (*g*) of Rule 201 of the King's Bench Act, be served upon the vendor out of the jurisdiction.

DECIDED: 26th February, 1912.

Statement

APPEAL from an order of the Referee in chambers refusing to set aside service of statement of claim on defendant Ernst.

W. H. Trueman for plaintiff.

F. J. Sutton for defendant Ernst.

ROBSON, J. This action was brought for specific performance of an agreement by defendant Ernst to sell to plaintiff certain lands in Ontario. The agreement was evidently made in Winnipeg at a time when defendant Ernst resided there. The purchase money is made payable at Winnipeg. Defendant Ernst is a citizen of, and now resides in, the United States of America. The statement of claim was served on him in the City of Saint Paul. The other defendants reside in Winnipeg and have appeared in this action.

The statement of claim contains an allegation that Ernst assigned all his title to the lands and in plaintiff's agreement to Just or the defendant The Canadian German Realty Co., Limited. Defendant Just admits a

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conveyance to him by Ernst and an assignment of the moneys payable by plaintiff to Ernst. So there is no question of notice to Just of plaintiff's rights.

In his affidavit filed in support of this application Ernst says: "8. That I have at the present time no interest whatever in the said lands, the same having been conveyed by me to the defendant Just in or about the month of May, A.D., 1908."

Defendant Just is, upon these facts, *prima facie* liable to plaintiff, at all events to the extent of the estate which he received, to carry out the agreement. The action is therefore properly brought against him. Ernst, being the original contractor with plaintiff, is certainly a proper party to the action.

Rule 201 says a statement of claim may be served out of the jurisdiction whenever

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

The English authorities mentioned in the Annual Practice, 1912, p. 95, would support this service *ex juris*.

I think the learned Referee was right and dismiss the appeal with costs.

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McDERMOTT v. BIELSCHOWSKY.

Before MATHERS, C.J.K.B.

Registered judgment—Priority—Practice in the Master's office—Notice to incumbrancers.

By the judgment in this action dated 8th November, 1911, it was declared that the plaintiff had a lien, charge and incumbrance upon the lands in question for the sum of $11,613.04 and costs in priority to defendant's interest therein, and it was referred to the Master to take the usual proceedings for redemption or sale.

In the Master's office one Kelly was added as a party in respect of a judgment against the defendant registered on 11th March, 1910, and the usual notice to incumbrancers was served upon him.

This was an appeal by Kelly from the report of the Master refusing to give his claim priority over that of the plaintiff.

Held, that, when a party added in the Master's office claims priority over the plaintiff, the proper procedure is to move to discharge the order making him a party, or to add to, vary or set aside the judgment, and that, as the appellant had made no such motion, he was bound by the judgment in the same way as if he had been made a party originally and had suffered judgment to be recorded against him by default.

McDougall v. *Lindsay*, (1884) 10 P.R. 247, followed.

Held, also, that the appellant's judgment, being only a charge upon the defendant's interest in the lands, gave him no greater right than the defendant himself had, and, therefore, could not rank ahead of the plaintiff's claim which the judgment in the action, by which the appellant was bound, declared to be prior to the interest of the defendant.

Appeal dismissed with costs.

DECIDED: 19th April, 1912.

Statement.

APPEAL by one Kelly, made a party in the Master's Office, against the Master's report refusing him priority over the plaintiff.

H. A. Burbidge for plaintiff.

B. L. Deacon for defendant.

MATHERS, C.J. K.B. The judgment directing the reference bears date the 8th November, 1911, and contains the following paragraphs:

"2. It is further adjudged that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure, and that for these purposes

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the cause be referred to the Master of this Court at the City of Winnipeg.

"3. And it is further adjudged and declared that the plaintiff has a lien, charge and incumbrance upon the lands and premises in the pleadings mentioned (describing them) in priority to defendant's interest therein to the extent of the sum of $11,613.04, and costs and of the moneys to be found due by the Master as aforesaid."

By Rule 634 a judgment, expressed as in paragraph two, is to be read and construed as if it set forth the particulars contained in Rules 118 to 131.

The appellant recovered a judgment in the County Court against the defendant (by original statement of claim) for $274.60 on the 11th day of March, 1910, and registered a certificate of such judgment on the 15th day of March, 1910. The Master added him as a party in his office and the usual notice to incumbrancers was served upon him, notifying him that if he wished to apply to discharge the order making him a party, or to add to, vary or set aside the judgment, he must do so within 14 days after the service of the notice, and if he failed to do so he would be bound by the judgment and the further proceedings in the cause as if he had been originally made a party to the action.

The appellant appeared by his solicitor before the Master and obtained time to move against the order making him a party. He did not, however, move against the order, but at the time fixed for such motion came in and proved his claim under his judgment, in the usual way. The plaintiff had in the meantime obtained an order from a Judge fixing the time for redemption at three months. To this last mentioned order the appellant took exception, and the solicitors for the plaintiff and appellant went before Robson, J., who, at the instance of the appellant and with the consent of the plaintiff, amended the judgment so as to provide for a sale instead of foreclosure, with three months for redemption. Upon settling the Master's

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report, the appellant claimed priority over the plaintiff, but this claim was not allowed.

The Master informs me that, in deciding the question of priority, he had before him and considered the facts alleged in the plaintiff's statement of claim. He says the statement of claim was read without objection, and that he understood the appellant intended to admit and did admit the truth of the allegations contained in it.

In my opinion, however, this appeal can be decided without going behind the judgment.

I am disposed to think, without actually so deciding, that the appellant has misconceived his right. Rule 118, which is the foundation of the proceedings in the Master's office, confines the inquiry to persons who have charges subsequent to the plaintiff's charge. A party added in the Master's office is so added on the assumption that he is a subsequent incumbrancer. If he claims to rank ahead of the plaintiff his right is to move to discharge the order making him a party. In one case, *McDonald* v. *Rodger,* 9 Gr. 75, Esten, V.C., entertained an appeal by a party added in the Master's Office against the decision of the Master assigning the plaintiff priority over him. That may have been a convenient course under the circumstances of that case, but I agree with the remarks of Boyd, C., in *McDougall* v. *Lindsay,* 10 P.R. 247, that in *McDonald* v. *Rodger,* "there was a deviation from the ordinary practice" and that he was 'against extending that case so as to allow parties to play fast and loose in the Master's office when they come in to get the benefit of a decree." That the proper procedure where a party added in the Master's office claims priority over the plaintiff is to move to discharge the order making him a party, is shown by such cases as *Glass* v. *Freckleton,* 10 Gr. 470; *McDougall* v. *Lindsay, supra, Lally* v. *Loughurst,* 12 P.R. 510, and *Crawford* v. *Meldrum,* 19 Gr. 165.

In this case the appellant, not having moved to discharge

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the order making him a party or to add to, vary or set aside the judgment, is bound by it in the same way as if he had been made a party originally and had made default in setting up any defence, and had suffered judgment to be recovered against him: *McDougall* v. *Lindsay, supra,* at 249. Not only has the appellant impliedly assented to the judgment by not taking steps to move against it, but his counsel, on the argument of this motion, expressly disclaimed any desire to question the judgment or the order making him a party. The judgment, thus binding upon the appellant, declares that the plaintiff has a lien, charge and incumbrance upon the lands in question in priority to the interest of the defendant Bielschowsky to the amount of the plaintiff's claim as found by the judgment, and also by the Master. The judgment proved by the appellant forms a charge upon Bielschowsky's interest, and of course gives him no greater right than Bielschowsky himself has. As by the judgment the plaintiff's claim is prior to Bielchowsky's interest, it follows that it must also be prior to the appellant's.

The appeal must be dismissed with costs.

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SELLICK V. TOWN OF SELKIRK.

Before ROBSON, J.

Practice—One defendant serving notice of trial before service of statement of claim on other defendant—When cause at issue—Abandonment by plaintiff of proceedings against one of several defendants.

Where there are two defendants, one of whom has not been served with the statement of claim, the cause is not at issue, although the time allowed by the Rule for such service has expired, for it is possible that plaintiff might succeed on an application under Rule 176 for leave to make the service. The defendant who has been served cannot, therefore, under such circumstances, bring on the action for trial, and a notice of trial served by him on the plaintiff should be set aside.

Ambroise v. *Evelyn*, (1879) 11 Ch. D. 759, followed.

Vandusen v. *Johnson*, (1883) 3. C.L.T. 505, not followed.

The proper course for the appearing defendant to take is to apply to strike out the name of the other defendant on the ground of abandonment after first inquiring as to the plaintiff's intention: *Ambroise* v. *Evelyn*, supra, and *Foley* v. *Lee*, (1888) 12 P.R. 371.

DECIDED: 23rd March, 1912.

Statement

ACTION by plaintiff against the Town of Selkirk and The Winnipeg Selkirk and Lake Winnipeg Railway Company for damages for personal injuries sustained by plaintiff, as alleged, as a result of negligence of the defendants.

The defendant the Town of Selkirk had been served with the statement of claim, had pleaded and served notice of trial.

The other defendant, the Railway Company, had not been served with the statement of claim. The period allowed for service had elapsed.

Plaintiff moved to set aside the notice of trial on the ground that the action was not at issue. The Referee granted the application and this was an appeal therefrom.

H. M. Hannesson for plaintiff.

F. Heap for Town of Selkirk.

ROBSON, J. It is of course possible that service on the Railway Company may still be permitted. See Rule 176. Whether or not such leave would be granted cannot be

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decided on this application. It cannot be overlooked that the plaintiff has the right to apply therefor.

Rule 545 provides that after the action is at issue either party may give notice of trial. Until all the defences are delivered the pleadings are not closed, nor the cause at issue: *Ambroise* v. *Evelyn,* 11 Ch. D. 759. The extent of the probability of there ever being a defence filed by the railway company cannot be considered. That there is a possibility of such a defence is enough.

The defendant The Town of Selkirk would be confronted by the same difficulty evidently were it to move to dismiss, as the cause must have been at issue two months. Rule 540.

Counsel for the Town of Selkirk cited a note of a case of *Vandusen* v. *Johnson,* 3 C.L.T. 505. The plaintiff there had issued his writ against several defendants, but served only one. The pleadings were, it is said, closed with the defendant served. On a motion to set aside a notice of trial (served, I infer, by the appearing defendant) on the ground that the cause was not at issue, it was held that the plaintiff, not having proceeded against the other defendants, must be taken to have abandoned as against them and that the pleadings were closed and the notice of trial regular. Very little can be learned from the meagre note, but it suggests that the pleadings were closed at the instance of the plaintiff himself by notation. This seems to have been the ground upon which the finding of abandonment was based.

I do not think that even strong evidence of abandonment by the plaintiff as against one defendant would entitle the other to act as if the cause were formally at issue.

The appearing defendant is not in such circumstances in any difficulty. He should inquire as to the plaintiff's intentions: *Ambroise* v. *Evelyn, supra,* and *Foley* v. *Lee,* 12 P.R. 371, and, if so advised, thereafter might apply to strike out the name of the defendant not served. That an

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available defendant had not been served within the prescribed period would, unexplained, be some evidence of abandonment.

I think the question of abandonment is one to be decided on an application in chambers, such as I have suggested. The action could not proceed to trial and final judgment with an unserved defendant still named on the record and not formally disposed of.

I think this appeal must be dismissed with costs in the cause to the plaintiff as against the defendant the Town of Selkirk.

ARONVITCH V. LOPER.

Before ROBSON, J.

Principal and agent—Commission on sales of shares—Sub-agent—Revocation of agency.

Plaintiff had an agency to sell shares of stock in a mining company for defendant on a commission of five cents per share. He employed one McMeans as a sub-agent to sell the shares, paying him three cents per share. Defendant was aware of this, but afterwards employed McMeans to sell more of the shares and paid him direct a commission of five cents per share. 70,000 shares were sold by McMeans under this arrangement. There was no effectual termination of the agency relationship between plaintiff and defendant on the one hand, or of that between plaintiff and McMeans on the other.

Held, that McMeans should be deemed to have been plaintiff's sub-agent in respect of such sales and that defendant was liable to plaintiff for the profit of two cents per share which he would have received, if the commission had been paid to the plaintiff direct.

Wilkinson v. *Alston*, (1879) 48 L.J.Q.B. 733, followed.

DECIDED: 8th May, 1912.

Statement

ACTION for the recovery of commission on sale of certain shares in a Company known as Lucky Jim Mines, Limited.

J. B. Coyne for plaintiff.

W. M. Crichton and *E. A Cohen* for defendant.

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ROBSON, J. The transactions in question took place in Winnipeg in the early part of the year 1911. Defendant was possessed or had control of a large number of shares of the stock of a Company known as "Lucky Jim Mines, Limited." Plaintiff had made sales of certain of these shares for defendant at varying rates of commission, the rate latterly being five cents per share. Defendant expressed to plaintiff his desire to increase the sales, to which plaintiff replied that he could not personally give more time to the business but could procure the assistance therein of one McMeans.

About this time an option to purchase 40,000 shares was given by defendant to plaintiff. Defendant says this was done to enable plaintiff to induce McMeans to proceed to sell. Plaintiff denied that and gave his version of the object of the option. It was something entirely different and had nothing to do with present issues. The pretended consideration of $1,000 was returned at once. Whether by reason of the option or not, McMeans, on being approached by plaintiff, entered on the sub-agency. Defendant was to pay plaintiff five cents a share sold. Plaintiff was at liberty to make such bargain with McMeans as he might. It was agreed between him and McMeans that the latter should receive three cents per share. McMeans describes what then took place as follows:

"The first shares that were sold were the ones that are in that list there of Blair's and at that time no arrangement was made with Mr. Loper and myself at all; I was under the impression if I went to Mr. Aronvitch's office I would get three cents a share in the event of that sale going through. As Mr. Blair asked me for the stock I went to Mr. Aronvitch's office; he was out. I went down to Mr. Loper and found him at the hotel and told him I desired to get 2,000 shares and that I had called at Mr. Aronvitch's office and he was out and I would like to get them as Mr. Aronvitch had said he would pay me three cents a share. Mr. Loper and I had a very long conversation down at the hotel there and during the course of that con-

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versation he asked me why it was—I was in one end of the city and Mr. Aronvitch in the other end—why it was I didn't act for myself. I said I would be very glad to, that I would certainly be more pleased to receive five cents than I would to receive three, so he gave me the Blair certificate and I turned him over the proceeds. That is the first sale that was made and the subsequent sales were done in the same manner."

The total sales through McMeans amounted to 70,000 shares. These extended from February 24th to June 6th, 1911. Plaintiff now asks to recover from defendant two cents a share on the 70,000 shares sold by McMeans.

As I understood it the defendant put forward as a defence that, the supposed option having been abandoned or surrendered, defendant became at liberty to deal with McMeans independently of plaintiff. The option to my mind was not a genuine transaction. Assuming defendant's version of the facts to be correct, the option was given to induce McMeans to work on sales under plaintiff. That object was attained. And it is on that sub-employment that the plaintiff bases his case. I cannot see that it is of any importance what became of the option. The real question, it seems to me, is: Did the agency to sell shares continue between defendant and plaintiff with McMeans as a recognized sub-agent during the period of the sales in question?

It is asserted that there was a termination of these relations between the three parties before the sales in question were made. Defendant says McMeans came to him and stated that he had not entered into an arrangement for three cents a share commission and would not sell except at five cents a share. This does not harmonize with McMeans' evidence as above set forth. I prefer to accept McMeans' version.

Whether defendant and McMeans or either of them could have terminated their respective relationships with plaintiff, so as to enable them to contract with each other to

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the exclusion of plaintiff, is, I think, open to question in view of the authority I am about to mention. There was, however, no attempt in that direction. Plaintiff never was informed of any revocation of authority by defendant or of any discontinuance of agency by McMeans. He learned the state of affairs after the sales in question had been made. Inquiry of defendant in the meantime had not led to disclosure of the facts.

In *Wilkinson* v. *Alston,* 48 L.J. Q.B. 733, plaintiff had been employed to find a purchaser. Through an agent of plaintiff one Wise learned of the property. Wise approached defendant who promised him a commission if he found a purchaser. He did find a purchaser. It was held that the sale resulted from plaintiff's efforts and he recovered commission.

The continuity between plaintiff's employment and the ultimate sale had not been broken and the defendant's dealing with Wise did not constitute a fresh departure. Bramwell, L.J., at 735, states a possible case of breach of continuity in the case of a stranger ascertaining from the first agent the name of his principal and thereupon procuring himself to be clothed with a like agency. The present case is not within any such exception. In the *Wilkinson* case Wise, whose interest was aroused through plaintiff, could not be treated as a stranger and nothing between him and the defendant there was permitted to affect the plaintiff. Likewise I would hold here that the dealing of defendant with McMeans did not affect the present plaintiff. The present case is stronger than the Wilkinson one in that there the defendant did not know that Wise had so become interested, whereas here the defendant knew McMeans was plaintiff's agent. In that case likewise the defendant had incurred two commissions. Bramwell, L.J., disposes of any question upon that in a word. At 733 he says: But if the defendant thought fit to promise Wise a commission that did not disentitle the plaintiff."

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The sales in question were secured exactly in the manner contemplated by defendant when he made the arrangement with plaintiff. That plaintiff's part therein was small is evident, but he did that part and the consideration for defendant's promise cannot be weighed. As long as the results were attained by machinery set at work by plaintiff, defendant is not concerned with the simplicity of the operation. It seems to me that, without effectual termination of the agency relationship between defendant and plaintiff on the one hand and plaintiff and McMeans on the other, the plaintiff is entitled to insist that the sales effected by McMeans were, as between plaintiff and defendant, effected by plaintiff.

Defendant having paid McMeans directly, the plaintiff is, in my judgment, entitled to recover commission of two cents per share in respect of the 70,000 shares sold by McMeans or his firm.

As to the shares bought by McMeans or his partner personally, and in respect of which plaintiff also claims commission, these cannot be said to have been sold as a result of the sub-agency and there is no evidence that plaintiff was instrumental in bringing about the sales to them for which the claim is made.

Judgment for plaintiff for $1,400.00 and costs.

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IN THE COURT OF APPEAL.

CRANE v. LAVOIE.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Bills and Notes—Promissory notes signed in name of a proposed company by defendants as president and manager respectively—Liability of defendants as makers of the notes or for breach of warranty of the existence of the company—Liability of persons signing as agents for others without authority—Bills of Exchange Act, R.S.C., 1906, *c.* 119. *s.* 52—*Implied warranty of the existence of the principal—Consideration—Forbearance to sue—Measure of damages.*

The defendant Fournier and one Laplante, a firm of plumbers, being indebted to the plaintiffs in the sum of about $1500, it was proposed that the plaintiffs should accept the promissory notes of a company about to be formed by Fournier, the defendant Lavoie and others to be called "The Fournier Company" in discharge of the account against Fournier and Laplante.

The plaintiffs agreed to the proposal and shortly afterwards received the notes sued on which began with the words "we promise to pay" and were signed "The Fournier Co., Ltd., F. X. Lavoie, President, D. Fournier, Manager." The proposed company was not incorporated until about three weeks afterwards, but the plaintiffs, at the time they received the notes, did not know that the incorporation had not yet taken place. If there was not an actual release of Laplante and Fournier's original debt, there was at least a request for forbearance in consideration of the notes being given and forbearance in fact was granted.

Held, that these facts showed a sufficient consideration for the notes. *Crears* v. *Hunter*, 19 Q.B.D. 341, followed.

Held, also, that, under section 52 of the Bills of Exchange Act, R.S.C. 1906, c. 119, as there was no such company in existence when the notes were signed, they were not within that class in which personal liability is excluded by words indicating that the maker is merely signing in a representative capacity or as agent, and must be held to be the promissory notes of the defendants Lavoie and Fournier, in view of the principle of construction provided for in sub-section 2 of that section and *ut res magis valeat quam pereat*.

Kelner v. *Baxter*, (1866) L.R. 2 C.P. 174, and *Thomson* v. *Feeley*, (1877) 41 U.C.R. at p. 234, followed.

Chapman v. *Smethurst*, [1909] 1. K.B. 927, distinguished.

Held, also, that the defendants might be held liable for a breach of the implied warranty of the existence of the Company and of their right to make the notes on its behalf.

Per RICHARDS, J.A. The proper measure of damages for such breach would be the amount of the notes and interest.

Parol evidence may be given to show that the parties actually signing

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a promissory note were not acting for any principal or as agents. This proof is involved in the evidence of the making of the note. The law is clear that he who signs a note is liable unless, by appropriate words in it, he exonerates himself from liability, and extrinsic evidence cannot be given to show in what capacity the maker intended to sign. 1912

Leadbitter v. *Farrow*, (1816) 5 M. & S. 349, and *Kew* v. *Pettet* (1834) 1 Ad. & E. 196, followed.

DECIDED: 20th May, 1912.

THE plaintiffs, the Crane & Ordway Company, were a corporation incorporated under the laws of the State of Minnesota, and licensed to do business within Manitoba. Statement.

The defendants, Lavoie and Fournier, both lived in St. Boniface.

The plaintiffs set up that on or about the 10th May, 1910, the defendants F. X. Lavoie and D. Fournier, purporting to act as the President and Manager respectively of the Fournier Company, Limited, signed six promissory notes for $200 each, dated 10th May, 1910, payable 2, 3, 4, 5, 6 and 7 months, respectively, after date, and one otherwise similar note for $115.79, the notes being signed as follows:

"The Fournier Co., Ltd."
"F. X. Lavoie, President."
"D. Fournier, Manager,"

that at the time of the making of the said notes there was no such company, that the notes were not paid at maturity and still remained unpaid.

The defence set up was that while the Company was in formation, and while the petition for incorporation was being signed, plaintiffs requested defendants to sign the paper writings on the forms which are usually used for promissory notes, as a provisional agreement, to be later on ratified by the Company, and there was no intention at the time to bind either the plaintiffs or the defendants, and the same was subsequently ratified by

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the Company, for the incorporation of which a petition was filed with the Provincial Secretary on the 13th May, 1910, and at the first meeting of the directors and share holders the notes were duly assumed by the Company.

The case was tried before Robson, J., who gave judgment for plaintiffs for the amount represented by the seven notes mentioned in the statement of claim with interest at 5 per cent. per annum from the maturity thereof respectively.

Defendants appealed.

C. P. Wilson, K.C., and *A. Dubuc* for defendants, appellants, cited *Chapman* v. *Smethurst*, [1909] 1 K.B. 927; *Brown* v. *Howland*, 9 O.R. 48, 67; *Dutton* v. *Marsh*, L.R. 6 Q.B. 361; *Alexander* v. *Sizer*, L.R. 4 Ex. 103; *Castrique* v. *Buttigug*, 10 Moo. P.C. 94; *Abrey* v. *Crux*, L.R. 5 C.P. 37, and *Edwards* v. *Grand Junction*, 1 My. & C. 650.

G. H. Ross for plaintiffs, respondents, cited *Kelner* v. *Baxter*, L.R. 2 C.P. 174; *Scott* v. *Lord Ebury*, L.R. 2 C.P. 255, and *Spiller* v. *Paris Rink Company*, 7 Ch. D. 368.

HOWELL, C.J.M. Section 52 of the Code declares that, where a person signs in such a manner as to indicate that he was signing for or on behalf of a principal, or in a representative capacity, he is not personally liable, but the mere addition of words to his name alone does not exempt him from liability. The notes in question begin with "We promise," and are signed:

"The Fournier Co., Ltd."
"F. X. Lavoie, President."
"D. Fournier, Manager."

It seems to me no one would ordinarily be deceived as to what was apparently intended by this signature. It commences with the name of a joint stock company, and this is verified by the signatures of the President and Manager, just as is commonly done in this country when

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a joint stock company makes a note, and it would follow that the defendants are not liable. However, on proving the signatures, it is shown that when the note was made no such company existed and so, of course, there was no president or manager of such company. If the defendants were president and manager respectively it was not of this company at all events.

Sub-section 2 of the above mentioned section declares that, in determining whether the signature was that of the principal or the agent, "the construction most favorable to the validity of the instrument shall be adopted." Now, if we strike out the first line of the signature, which then was a myth, we have left the individual names of the defendants, each with a mere addition as meaningless in this case as "Esquire," and, if the defendants are held liable as makers of the note, the construction demanded by the sub-section is complied with.

No doubt the rule as to admitting parol evidence to vary the liability of parties upon negotiable instruments is very strict. Parol evidence, however, can undoubtedly be given to show that an agent acting for a then existing principal had no authority to act, and then the agent is liable, not as a party to the note, but for breach of warranty of authority, as in *West London* v. *Kitson*. 13 Q.B.D. 360, and I can see no reason why parol evidence should not be given to prove that the parties actually signing the paper were not acting for any principal, and were not acting as agents, and as they did act they acted for themselves and are liable as principals. This proof really in both instances arises in proving the making of the note.

It does seem to me that, untramelled by authority, the proper conclusion to come to under the Code is to hold the individual defendants liable as makers of the note.

Prior to the Code the cases on this subject are numer-

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ous and conflicting. The "anarchy" of the decisions is well illustrated by the United States Supreme Court in *Falk* v. *Moebs,* 127 U.S. 597. Suppose in that case the company was in fact at the time of the making of the note non-existent, can it be doubted that the defendants would have been held personally liable?

In *Thomson* v. *Feeley,* 41 U.C.R. 235, Mr. Justice Adam Wilson held, following *Kelner* v. *Baxter,* L.R. 2 C.P. 174, that if the agent acted for an existing principal and signed as such without authority he was not liable on the note, but was liable on breach of warranty; but where there was no principal he was liable on the note.

The case of *Dutton* v. *Marsh,* L.R. 6 Q.B. 361, was cited as an authority that the defendants were liable even if the company had been in existence, but that case was decided before the Code, and it seems to me not in harmony with section 52. However, that case was explained away pretty well in the case of *Chapman* v. *Smethurst,* [1909] 1 K.B. 73, and 927. A perusal of the judgments in the last mentioned case convinces me that, if in that case there was no company in existence when the note was made, the defendant would have undoubtedly been held liable.

I have not overlooked the partnership case of *Fairchild* v. *Ferguson,* 21 S.C.R. 484, but in that case the partnership was in existence, and the Court held that the defendant's signature as manager was the signature of the existing partnership.

In signing their names to bind a company that did not exist they really endeavoured to keep themselves from liability, as in *Watling* v. *Lewis,* [1911] 1 Ch. 414, where the subscribing parties had it stated in the document that they were not to be personally liable, yet they were held liable.

The appeal must be dismissed with costs.

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RICHARDS, J.A. The facts are stated in the judgment of the learned trial Judge and my brother Judges.

It seems to me that there are three propositions argued with respect to the instruments in question, which I shall, for convenience, call notes.

First, that, when made, they were the promissory notes of the defendants Lavoie and Fournier.

Second, that, if they were not their promissory notes, they (Lavoie and Fournier), by signing them for and on behalf of the alleged company, warranted to the plaintiffs that such a company existed and that they had power on its behalf and in its name to make them the company's promissory notes.

Third, that the notes were nullities.

I cannot accept the idea that the notes were nullities. It might be possible that, if the plaintiffs were shown by the evidence to have known, when they took the notes, that the company was not in existence, and to have agreed that they would not look to the defendants but would only look to the company for payment, if brought into existence in the future, taking the risk of the company being created and making the payment, there might be something in this point, because they would then know that what they were taking were instruments that had no validity and it would be so intended between the parties. The evidence, however, does not seem to me sufficient to show that the plaintiffs knew, when taking the notes, that the company had not yet been incorporated, and the onus of proving this knowledge on their part lies, I think, on the defendants.

In *Thomson* v. *Feeley,* 41 U.C.R. 229, the late Sir Adam Wilson, in giving the judgment of the Court of Queen's Bench for Ontario in Term, said, at page 234:

"It is established that, although a person signs an agreement on behalf of a company, and the company has no existence at the time, but is only projected or in

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prospect, he is personally liable, because there is no such principal whom he does or can represent, and the agreement would be wholly inoperative if it were not to be binding on the person who has signed it: *Kelner* v. *Baxter,* L.R. 2 C.P. 174. But, if there be a principal, and the principal never gave authority to one who professes to act as agent, or if the principal had no power to do the act which the agent has done, the agent is not liable upon any agreement he may have entered into, professing to be such agent, as the principal in the transaction, but he is liable to an action for damages for a breach of warranty of authority to act as the agent of the principal he assumed to represent: *Collen* v. *Wright,* 7 E. & B. 301; *Richardson* v. *Williamson,* L.R. 6 Q.B. 276."

In *Thomson* v. *Feeley* the defendant, signing his name with the word "secretary" after it, purported to enter into an undertaking on behalf of an as yet unincorporated company which he named in the instrument, and it was held that the defendant was *prima facie* liable, because at the time he signed the receipt there was no company and, therefore, no principal whom he could bind, and that it must therefore be presumed, to give the instrument validity, that he executed it on his own behalf.

If the above quotation from Mr. Justice Wilson's judgment correctly states the law, then the notes now in question became, under the circumstances of this case, the promissory notes of the defendants Fournier and Lavoie. I find myself unable to decide how far *Kelner* v. *Baxter* bears out the learned Judge in the above. In some subsequent cases *Kelner* v. *Baxter* is said to turn rather upon the fact that the form of the body of the instrument there showed an intention on behalf of the defendant to make himself liable. Now there was, I think, in the present case, no such intention on the part of the defendants and nothing in the body of the instrument shows it. But I do not think that, for the

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purpose of this action, it is necessary to decide whether the notes in question are the defendants' personal promissory notes or not. For, if they were not such, they were at least warranties by the defendants that the alleged company, on whose behalf they purported to give the notes, was an actually existent company and that they had power to sign on its behalf; and it seems to me that, in either alternative, they are bound to make the notes good, though the action in one case would be upon the notes and in the other upon the misrepresentation.

But it is said that if these documents are but a warranty of the existence of the Company, and of the defendants' right to make the notes on its behalf, then the damages would not be the full amount of the notes, but rather the amount which the plaintiffs would have succeeded in collecting upon these notes if they had in fact been the notes of the company of the same name, which was afterwards formed; and it is pointed out that, owing to that company having become insolvent, the plaintiffs, if they had had that company's notes, would not have been able in fact to recover their face value, but merely such dividend as could be recovered by ranking on the company's estate.

The last argument is one which, if we could hold it valid, would in fact meet the ends of justice; but I cannot see that it is good in law. We must treat the instruments as what they were at the time when they were executed. Now, when they were executed, the company did not exist, and it might never have come into existence. If it had not come into existence, then I think no question could be raised that the defendants would, on their above-named warranty, be liable for the full face amount of these promises to pay. That is the position in which I think the matter stood when the notes were taken. Can the fact that there was subsequently incorporated a

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company, bearing the same name as that in which the notes purported to be executed, make any difference?

The argument that the Company, after its birth, ratified the notes as its own promises to pay, must fail. A corporation has no power to ratify contracts made on its behalf before its incorporation. It can only do so in effect by making a new similar contract of its own. Even if it had power to ratify, that, in itself, would not change the effect the notes had when they were made.

It seems to me that, whether we hold that the defendants made the notes, or hold that they entered into the warranty, as above mentioned, in either case they have to make good their face value.

I would dismiss the appeal with costs.

PERDUE, J.A. I agree with the finding of the learned trial Judge that there was sufficient consideration for the making of the notes in question. The plaintiffs delayed their remedies against Fournier & Laplante, the original debtors, and permitted the assets of that firm to be handed over to the Fournier Co., Limited, which was to assume the liabilities of Fournier & Laplante. The plaintiffs not only granted the request for forbearance as against the original debtors, but also changed their position by permitting the transfer of assets.

I also agree in the finding that the evidence does not establish that Thompson, the plaintiffs' accountant, had knowledge that the Company had not been incorporated when the notes were delivered to the plaintiffs. On the other hand, information as to the condition of the incorporation proceedings was within the knowledge of the defendants and the other incorporators, and the plaintiffs had a right to assume that the officers of the Company would not make and issue notes of the Company before it was incorporated.

It is claimed that defendants are liable either as makers of the notes or for breach of warranty as to the

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existence of the Company and the defendants' authority to sign the notes on its behalf.

In considering the first of these two questions it is essential that the form of the notes and the manner in which they are signed should be carefully scrutinized. Whether the defendants have sufficiently excluded their personal liability and shown that they signed on behalf of another party, must be gathered from what appears on the face of the notes: *Leadbitter* v. *Farrow*, 5 M. & S. 349. Extrinsic evidence cannot be given to show in what capacity the maker intended to sign: *Thomas* v. *Bishop*, 2 Stra. 955; *Rew* v. *Pettet*, 1 A. & E. 196; *Kelner* v. *Baxter*, L.R. 2 C.P. 174; *Brown* v. *Howland*, 9 O.R. 48; *Hagarty* v. *Squier*, 42 U.C.R. 165. All the notes sued upon in this action are in similar form, the only difference being in the time of their maturity. The following is a copy of one, which will serve for all:

"$200. St. Boniface, May 10th, 1910.

"Two months after date we promise to pay to the order of Crane & Ordway Co. at the Northern Crown Bank here the sum of two hundred dollars. Value received.

The Fournier Co., Ltd.
F. X. Lavoie, Pres.
D. Fournier, Manager."

At the time the notes were signed the Fournier Co., Limited, had not been incorporated. The letters patent incorporating that company bear date 2nd June, 1910. Section 52 of the Bills of Exchange Act, as made applicable to promissory notes by section 186, declares that, where a person signs a promissory note as maker "and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability." Sub-sec-

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tion 2 provides the rule that is to be followed in determining the capacity in which the signer of the note has placed his signature upon it. That sub-section enacts that, in determining whether a signature on a bill or note is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

The notes in question were signed by the defendants. The addition of the word "President" or the word "Manager" after one of the signatures is not in itself sufficient to exclude the personal liability of the party signing. The note commences with the words "We promise" which would be quite appropriate in the case of a note intended to be the note of two or more parties. As has already been pointed out, no explanation, outside what appears on the note, is permissible to show in what character the parties signed. But it is urged that the name of the Fournier Co., Ltd., appears above the individual signatures and it is argued that the natural inference is that the defendants were signing as president and manager of that Company, and not as actual makers. It appears to me that one fact which confronts the defendants at the very threshold of the case is fatal to the above contention. There was no such company or any such entity as the Fournier Co., Limited, when the notes were signed. Where there was no principal there could be no agent. Where there was no company there was no president or manager. Then, in order to give any validity to the document, *ut res magis valeat quam pereat,* we must assume that the parties signing it made themselves personally liable. Otherwise, there being no principal who can be made liable, the note would have no validity and would become a mere meaningless paper.

The principle upon which this proposition rests is well exemplified in *Kelner* v. *Baxter,* L.R. 2 C.P. 174. In that case a proposal in writing was made by the

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plaintiff to A. B. and C. on behalf of the proposed Gravesend Royal Alexandra Hotel Co. for the sale of certain goods. The proposal was accepted by "A. B. and C. on behalf of the Gravesend Royal Alexandra Hotel Co." At the time of the acceptance there was no such company in existence. The Court unanimously held that A. B. and C. were personally liable. Erle, C.J., in giving judgment (p. 183) said:

"I agree that, if the Gravesend Royal Alexandra Hotel Co. had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby."

So also, in *Thomson* v. *Feeley,* 41 U.C.R. 229 at p. 234, Wilson, J., gave expression to the same principle in these words:

"It is established that, although a person signs an agreement on behalf of a company, and the company has no existence at the time but is only projected or in prospect, he is personally liable, because there is no principal whom he does or can represent, and the agreement would be wholly inoperative if it were not to be binding on the person who signed it." See also *Rew* v. *Pettet,* 1 A. & E., 196.

This being the law in respect of ordinary contracts, it applies, by the effect of the sub-section of section 52 of the Act, *a fortiori* to the case of promissory notes. "The construction most favorable to the validity of the instrument shall be adopted." Therefore, in the present case, if the defendants are not held liable personally, the instruments bind no one and fall to the ground as worth-

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less. I think the construction necessarily to be adopted in this case is to hold the defendants liable as makers of the notes.

The case of *Kelner* v. *Baxter,* above referred to, is also authority for the proposition that a subsequent ratification by the Company, after it came into existence, did not relieve the defendants from the liability that had attached to them upon the making of the instrument. The contention, therefore, founded on the resolution of the Company after incorporation to assume and pay the notes, that the plaintiffs had, or could have, obtained what they bargained for (the promise of that Company), cannot avail the defendants.

I think the defendants might also be made liable for breach of their implied warranty that the Fournier Company, Limited, was incorporated and in existence and that they had the power to sign the notes on behalf of that Company. A question was raised as to what would be the measure of damages accruing to the plaintiffs in such a case. I do not think it necessary to decide that question. I prefer to decide this case simply upon the ground that the defendants are liable as makers of the notes.

The appeal should be dismissed with costs.

CAMERON, J.A. The promissory notes in question in this case contain the words "We promise" in the body and are signed:

"The Fournier Co., Ltd."
"F. X. Lavoie, Pres."
"D. Fournier, Manager."

The terms President, Manager, Agent, etc., attached to a signature are regarded as merely *designationes personæ.* The rule is applied with peculiar strictness to bills because of the non-liability of the principal: *Chalmers on Bills of Exchange,* 86. Ordinarily, in the case of a written contract signed by a person as principal, who

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is in fact agent for another, parol evidence can be given to show that the agent has an undisclosed principal who thereby becomes liable on the instrument as a party, although it does not follow that the agent ceases to be liable: *Higgins* v. *Senior,* 8 M. & W. 834. But this doctrine is inapplicable to the case of a bill.

The contracts of the parties to bills and notes as appearing on the face of the instrument, whether of drawer, acceptor, maker or indorser, cannot be varied by parol evidence: *McLaren on Bills and Notes,* at p. 46, and the cases there given.

The law is clear that no party can be charged as principal upon a negotiable instrument unless his name is disclosed on its face.

"The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is 'a courier without luggage,' whose countenance is its passport; and, in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto, unless his name in some way is disclosed upon the instrument itself; although upon other written contracts, not negotiable, it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly. The rule excluding parol evidence to charge an unnamed principal as a party to negotiable paper is derived from the nature of such paper which, being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the original party as the payee himself has, must indicate on its face who is bound for its payment; for any additional liability not expressed in the paper would not be negotiable": *Daniels, Negotiable Instruments,* sec. 803.

The law is also clear that he who accepts a bill or signs a note is liable unless, by appropriate words in the instrument, he exonerates himself from liability.

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This principle is thus stated by Lord Ellenborough in *Leadbitter* v. *Farrow*, 5 M. & S. 349: "Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are the words of exclusion? Unless he says plainly 'I am the mere scribe,' he becomes liable." Nothing could be clearer than this statement.

On the face of it this note is the joint note of the Fournier Co., Ltd. and Lavoie and Fournier. But such a Company had no existence at the time the note was given and this to the knowledge of Lavoie and Fournier, who knew they were not and could not be its president and manager.

Have these signers, Lavoie and Fournier, in subscribing themselves as makers, used any words in this instrument to exclude their personal liability? Or, to put it in another way, are their names on this document in such a manner as to negative their own obligation and assert that of another? Had the body of the note contained the words "The Fournier Co (Ltd.) promises" (not "We promise"), it might well be argued that, there being no apt words to charge Lavoie and Fournier, and no authority of course on their part to sign as agents, (and, in fact, no principal to be agents for), the instrument must fall as being void. But the name of the company is not used in the body of the note, while the personal pronoun "We," to which it is difficult not to attach some significance, is. I can see no words used in this instrument that plainly express an intention to exclude the personal liability of the individual signers. They do not state in the note that they are signing on behalf of, or on account of, the Company, nor do they expressly negative their own obligation as they might have done by adding the words "but not individually"

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to qualify "promise" (as was the case in *Barlow* v. *Lee*, 8 Allen, 466), or by inserting either of the words "by" or "per" before their own names, or using other words indicating that they signed merely in a ministerial capacity.

In *Dutton* v. *Marsh*, L.R. 6 Q.B. 361, a note reading "We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton," etc., and signed with their individual names, was held to bind the directors personally, although sealed with the corporate seal. "There is no case," said Lord Chief Justice Cockburn, at p. 365, "that goes to the length of saying that the affixing of the seal, where the parties do not otherwise use terms to exclude their personal liability, would have that effect."

The words "Pres." and "Manager" used in the note are, it would seem to me, words of description within section 52 and nothing more, and therefore insufficient, of themselves, and without further apt words, to exempt the signers from personal liability. But it is not necessary in the case here presented for our consideration to determine the legal position of the parties signing had the Company actually been in existence at the time of the making of the notes.

These parties, thus signing the note, must have intended to bind somebody upon the instrument. There was no company in existence and the words "Pres." and "Manager" convey nothing and mean nothing, and what is left? As there are no promisors but themselves appearing thereon, the note can be construed as their note. Otherwise it would be a nullity, and it is the declared policy of the Act that the construction most favorable to the validity of the instrument shall be adopted: sec. 52, sub-sec. 2. Here, if there be no liability of the individual promisors, there is no liability of any one.

If it is the duty of officers of a corporation who, when

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executing negotiable instruments on behalf of the corporation, desire to keep themselves free from any personal liability thereon, to exclude that liability by the use of clear and specific language on the face of the document, then it surely follows that, when they merely assume, with full knowledge, to be acting for a corporation which has no present existence, that duty demands the clearest language on their part if they wish to keep themselves clear. In point of fact, they are, as I have stated, not officers in this case. The words "Pres." and "Manager" on the note in question were really meaningless when the signatures were affixed. They are mere surplusage and without any greater effect on the names of the individual signers than if they had been omitted altogether. Had they been omitted it would seem to me impossible to uphold the non-liability of the signers, and their actual use is devoid of effect.

What would have been the position of these individuals had the incorporation of the Company never been proceeded with? I think it would surely have been difficult then to argue that no one was liable on this note. The signers, as I have stated, intended to bind some one. And it must be taken that they did not intend to bind a non-existent person or corporation. The signers do not state upon the face of the instrument that they subscribe themselves for, or on account of, another. In accordance with the Act, the maxim *ut res magis valeat* is to be held applicable so that this instrument may be a valid negotiable security and not a nullity. I need hardly say that the legal liabilities arising out of the instrument are not affected in the slightest by the subsequent incorporation of a company with a name similar to that mentioned in the note. I am of the opinion, therefore, that the promisors are liable as individuals.

We were referred to a late case in appeal of *Chapman* v. *Smethurst,* [1909] 1 K.B. 927. There it was held

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that the note given was so given in accordance with the provisions of the Companies Act, 1862. "No question arises here," says Vaughan-Williams, L.J., at p. 928, "as to the authority of the defendant to sign the promissory note: it is admitted that he had the Company's authority to do so. To my mind when you have once got a promissory note so drawn as to bind the Company, *and when the form of the note is such that no question of joint liability* can arise, it almost conclusively shows that the note is in such a form that the Company alone is liable, and I have no doubt that the Company is alone liable on this particular note." I call attention to the italicized words as bearing upon the form of the note before us and as indicating an important difference between the note in that case and the one we are now discussing.

In *Chapman* v. *Smethurst, supra*, *Lindus* v. *Melrose*, 3 H. & N. 177; *Dutton* v. *Marsh, supra,* and *Alexander* v. *Sizer,* L.R. 4 Ex. 102, are discussed and distinguished. I refer also to the case of *Landers* v. *Marcus,* 25 T.L.R. 478, where a cheque was signed by the two defendants as directors of a company. "The defendants had not said that they did so on behalf of the Company" and were held personally liable.

As to the question of want of consideration, it seems to me that the facts of the case satisfy the requirements of the law. "The consideration required to support a promise has been defined as consisting of any damage, or any suspension, or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, although no actual benefit accrue to the party undertaking." *Leake on Contracts,* 431.

I think Lavoie is liable as maker of the promissory notes in question and that the appeal should be dismissed.

HAGGART, J.A. In *Chapman* v. *Smethurst,* [1909] 1 K.B. at p. 930, Kennedy, L.J., approves of the test

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applicable to such cases laid down in *Lindley on Companies,* 6th ed. vol. 1, p. 280: "The question is in every case one of construction. Is the bill or note the bill or note of the Company or not? Does it really purport so to be? For, although given for the purposes of the Company, the bill or note may not even purport to bind it. If on the true construction of the instrument the bill or note is the bill or note of the Company, the Company will be liable upon it and not the individuals whose names are on it, unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the Company, the persons whose names are upon it will be liable upon it whether they intended to be so or not."

In *Thomson* v. *Feeley,* 41 U.C.R. 236, where a similar question was involved, Wilson, J., who delivered the judgment, in which Harrison, C.J., and Morrison, J., concurred, suggested a form of plea which might show a good defence, setting out that both parties believed the writing was not binding on the defendant, and that it was not the intention to bind him, and that the writing so drawn was a mistake and the mistake of both parties, and that the plaintiff was taking an inequitable advantage of such mistake by suing the defendant upon it.

If such were a defence it would not be available here. Equity will, of course, interpose and grant relief on the ground of mistake, but only if it can restore the parties to their former condition, or place them in the same situation in which they would have stood but for the mistake. Here the old debtors have been divested of all their assets and the new Company could not now, if it desired, give the securities originally contemplated.

Sub-section 2 of section 52 of the Bills of Exchange Act reads: "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted." Unless we construe the instrument as the notes of the defend-

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ants the documents would mean nothing and be binding upon no one.

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I think the appeal should be dismissed.

HAGGART, J.A.

Appeal dismissed.

IN THE COURT OF APPEAL.

ROGERS v. GRAND TRUNK PACIFIC R. W. CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Negligence—Railway company—Animals straying on to railway track—Railway Act, R.S.C. 1906, *c.* 37, *s.* 294, *s-s.* 4.

The plaintiff's claim was for the killing of four horses by a train of the defendants. The horses had been in an enclosure surrounded by a wire fence four feet high and about half a mile from the railway. There was an opening in the fence between a building and a tree which the plaintiff said he had closed with boards to the height of 50 inches on the night before the horses were killed. In the morning he discovered that the boards closing the gap had been broken down and that the horses were gone. He and his family made immediate and diligent search for them, but it appeared that, after wandering about, they had got on to the railway track at a road crossing where there were no cattle guards as required by the Railway Act, and were run into by a train near that point.

Held, that this evidence had not been displaced by that of the witnesses for the defence, and, upon it, the defendants had not satisfied the onus of proving that the horses had "got at large through the negligence or wilful act of the owner" cast upon them by sub-section 4 of section 294 of the Railway Act, R.S.C. 1906, c. 37, and were, therefore, liable under that sub-section to the plaintiff for the damages caused to him.

RICHARDS, J.A., dissented.

DECIDED: 29th April, 1912.

ACTION to recover damages for the loss of four horses killed or injured by being struck by an engine of the defendants, running on their line of railway. Statement.

The following judgment at the trial was delivered by

MACDONALD, J. The plaintiff occupies the east half of section ten, township twelve, range nineteen, west of the

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First Principal Meridian, and the line of the defendant Company runs through it.

On the 12th or 13th day of December, 1910, five horses, the property of the plaintiff, strayed on to the defendant Company's track, and on the 13th December they were found on the side of the track, one dead and three others so injured that it became necessary to destroy them, the fifth escaped, and the plaintiff brings this action claiming damages for the loss of the four horses.

Although there was no eye-witness to the running down of the horses by the defendant Company, yet I have no hesitation in finding that the injuries sustained, with the results that followed, are attributable to the animals being struck by an engine of the defendant Company and running on their line of railway.

One of the defendant's witnesses says that the 7.30 train was the one that did the damage.

Section 294, s-s 4, of cap. 37, R.S.C. 1906, provides that:

"When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animals so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction unless the company establishes that such animal got at large through the negligence or wilful act of the owner or his agent or of the custodian of such animal or his agent."

The exception in the cases otherwise provided for by the next following section referred to in the above section has no application here.

It is conceded by counsel for the Railway Company that to entitle them to succeed the onus is upon them of proving that the animals got at large through the negligence or wilful act or omission of the owner or his agent,

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The question is, therefore, one purely of fact.

The plaintiff kept the horses in an enclosure surrounded by a wire fence four feet high. This enclosure is about half a mile from the Railway Company's track. The horses escaped from this enclosure, and it is claimed by the defendant Company that such escape was through the negligence or wilful act or omission of the plaintiff in not having his fences in proper condition or repair, and in such a condition as to be unfit to hold within its enclosure any animal.

Now what is the evidence of negligence against the plaintiff?

His own evidence is that on the evening of Saturday, December 11th, the horses were placed within this enclosure where they had been for three weeks previous to this date; a poultry house stands at a point about the centre of the south fence of the enclosure; to the east of this poultry house stands a tree a few feet distant, and between this house and tree is the gap through which ingress and egress could be had to the enclosed field. When the horses were placed within the enclosure this gap was closed up by boards to the height of fifty inches. On the evening of the 11th December, the plaintiff says that about dark he fed the horses in this enclosure and the gap between the house and the tree was closed. In the morning he discovered the boards closing the gap broken down and the horses gone. That the plaintiff and his family made diligent search immediately there is no doubt. The animals wandered in different directions, finally getting on to the railway track at a crossing of the road allowance north west of the plaintiff's farm, and at this crossing there were no cattle guards as required by the Railway Act. A short distance west of this point on the track the horses were found in the condition mentioned.

For the defence William D. Hayes is the principal

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witness. He was engaged by the plaintiff as a farm laborer, taking care of the horses, cattle, etc. He went to the plaintiff's place on the 10th December, 1910, but he says he never saw the horses in question there. In referring to the fence surrounding the enclosure where the horses had been kept, he says there was an opening and that, during the three months he was there, he never saw it closed, and there was no gate through which the cattle passed. There also was an opening at the poultry house where he was told the horses had broken through, and this also he says was down all the time he was there. These were the only openings in the enclosure, and, although he says this was the condition of the fence during all the time that he was there, I am satisfied that he knows nothing of the conditions prior to the horses breaking through; and, although he went to the plaintiff's on the evening of Saturday the 10th December, 1910, it seems to me unreasonable that he would take such note of the fence and its openings on the day following, which would be Sunday and the ordinary routine of work not followed, as would enable him to speak with any degree of certainty of conditions on the 11th, and on the evening of that day the horses escaped.

The only other witness for the defence was Robert W. Adams and, although he condemns the plaintiff's fences, I am not quite satisfied with his testimony. On December 5th he called at plaintiff's in search of a missing horse and went to the south boundary of the fifty acre enclosure and there were no horses within the enclosure, but he says he would not expect them there at that hour in the morning. In describing the condition of the fence he says his heifer one day went through the fence; but, on cross-examination, he admitted that he did not see the animal go through, and the plaintiff's evidence that this heifer followed his herd seems the more reasonable.

I realize how difficult it is for the Railway Company

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to satisfy the onus cast upon it, but I do not think that the plaintiff here was negligent, or, at any rate, if he was, the evidence does not, to my mind, sufficiently establish that fact.

There will be judgment for the plaintiff for six hundred dollars, with costs.

Defendant appealed.

J. Auld for defendants, appellants, cited *Laporte* v. *C.N.R.*, 8 Can. Ry. Cas. 137; *Bourassa* v. *C.P.R.*, 7 Can. Ry. Cas. 41; *Cripps* v. *Judge*, 13 Q.B.D. 583, and *Higley* v. *Winnipeg*, 20 M.R. 22.

W. H. Trueman for plaintiff, respondent.

THE COURT dismissed the appeal with costs, (Richards, J.A., dissenting) on the ground that the breaking of the boards established a *prima facie* case of negligence.

IN THE COURT OF APPEAL.

REX v. KERR.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Criminal law—Criminal Code, s. 951—Conviction for minor offence included in offence charged—Shooting with intent to murder charged—Conviction for shooting with intent to maim, disfigure or disable or to do some other grievous bodily harm—Judge's charge to jury—Non-direction—New trial.

On the trial before a jury of a person charged with shooting with intent to murder, the Judge should, on the request of the counsel for the Crown, charge the jury that, if, in their opinion, the evidence did not warrant a verdict of guilty on that charge, but was sufficient to warrant a verdict of guilty of shooting with intent to maim, disfigure or disable, or to do some other grievous bodily harm, they should, under section 951 of the Criminal Code, bring in such latter verdict, for the latter offence is included in the former.

The Court, however, in this case refused to grant a new trial because of the refusal of the trial Judge to give such a direction, on the ground that the evidence was not such as to warrant the granting of a new trial and, moreover, as the accused had been tried once, a second trial on the same facts should not be ordered.

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DECIDED: 1st May 1912.

Statement.

RESERVED case stated by Metcalfe, J.

"Robert Kerr was tried before me with a jury at the Spring Assizes for the Northern Judicial District, on a charge of having at the Rural Municipality of Minto in the Province of Manitoba, on the ninth day of November, one thousand nine hundred and eleven, shot at Alexander Miller with intent to murder; on which indictment the jury returned a verdict of not guilty.

On the trial counsel for the Crown asked me to direct the jury that, if the evidence justified it, a verdict of shooting with intent to maim, disfigure or disable, or to do some other grevious bodily harm, might be found on the indictment as laid.

There was evidence which, if believed by the jury, would have justified such a verdict.

I refused to so direct the jury. Was I right?

Dated at Winnipeg this 18th day of April. 1912.

(Sgd.) Thomas L. Metcalfe, J.'

R. B. Graham, Deputy Attorney-General, for the Crown stated that he had served notice of the application upon G. A. Eakins counsel for the accused, but that he had not been able to effect personal service upon the accused himself. The cases show that the retainer of counsel ends with the verdict of the jury, therefore the accused would have to be served personally.

G. A. Eakins admitted that he had shown the accused a copy of the notice served upon him.

The Court seemed to be of opinion that that was not sufficient and as Mr. Eakins stated he could have his client present in Court the next morning the case was allowed to stand.

The case was argued the next day when the accused was present in Court.

R. B. Graham, Deputy Attorney-General, for the Crown.

G. A. Eakins for the accused.

THE COURT held that the question should be answered in the negative, but refused to grant a new trial, as asked for by the Crown, holding that the evidence was not such as to warrant a new trial being granted. Moreover the

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accused had been tried once, and the Court would not direct a second trial on the same state of facts as those on which he had been tried before. 1912 Judgment.

GILLESPIE v. WELLS.

Before PRENDERGAST, J.

Vendor and purchaser—Subsequent mortgage by vendor—Tender—Specific performance.

When a purchaser of land, under an agreement of sale, gets notice of a mortgage on the land created by the vendor, subsequently to the sale, but before all payments have been made, his remaining payments should be made to the mortgagee and not to the vendor, otherwise he may have to make the payments over again.

Dart on *V. & P.* vol. 2, p. 386, and *Rayne* v. *Baker*, (1859) 1 Giff. 241, followed.

The plaintiff in this action asked for specific performance of the defendant Well's agreement to sell him the land in question. He had tendered to the defendant's agent a sum which fell short by only $2.20 of the correct amount, $167, payable by him for a conveyance, but this was refused.

Held, that, under the circumstances of this case as set out in the judgment, the maxim "*de minimis non curat lex*" should be applied, and so trifling a shortage should not preclude the granting of the relief sought, especially as plaintiff had paid Wells $191.75, which should have been paid to the mortgagee.

DECIDED: 29th April, 1912.

ACTION for specific performance of an agreement for the sale of land wherein the plaintiff was the purchaser and defendant Wells the vendor. Quickfall was joined as a defendant for the purpose of having removed from the Registry Office files a mortgage made by his co-defendant Wells to him, subsequently to the making and registering of the agreement for sale. Statement.

W. D. Card for plaintiff.

A. G. Kemp for Wells.

A. C. Campbell for Quickfall.

PRENDERGAST, J. The agreement for sale is dated

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October 13th, 1903, and was registered on December 13th following. The consideration therein stated is $1,200 bearing interest at 6 per cent., and payable in periodical instalments extending till November 1st, 1909.

The mortgage from Wells to Quickfall is dated February 20th, 1908, and was registered May 4th following. It is made to secure $500 payable March 1st, 1911, with interest at 10 per cent. payable yearly.

On October 24th, 1908, Quickfall served the plaintiff with notice in writing of this mortgage.

The plaintiff alleges that, before action, she tendered $164.80 both to Wells' solicitor in Winnipeg (Mr. Affleck) and to him personally at Lockport in the State of New York, which was in each case rejected; and that the said amount covered the balance of all sums due under the agreement together with costs of deed.

Wells denies in his defence that the tenders were ever made, that Mr. Affleck was an agent for the purpose of receiving money on his behalf, and that the alleged tender covered all sums still due under the agreement.

The defence of Quickfall is to the effect that there was a balance of the purchase price under the agreement still unpaid by the plaintiff when she was served with notice in writing of the mortgage.

First, as to Quickfall. I find that on October 20th, 1908, when Quickfall served plaintiff with notice of the mortgage, there were two payments not yet due and consequently not made under the agreement for sale; that the same have all since become due and none of them have been paid to Quickfall.

The proposition is well established that, "if the purchaser knows of an incumbrance, either before or after the execution of his conveyance but before payment of the whole of the purchase money, he will be liable to the extent of any purchase money which he subsequently,

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without the consent of the incumbrancer, pays to the vendor:" *Dart on Vendor & Purchaser*, vol. II, 886.

In *Rayne* v. *Baker*, 1 Giff. 241, where the vendor, pending payment of the balance of the purchase price, withheld the title deeds and left them as security with a third party, the Vice Chancellor said: "Whatever equitable interest the vendor had, by his depositing the title deeds by way of equitable mortgage, would pass to that equitable mortgagee. The plaintiff here sues as equitable mortgagee to assert against the purchaser his right to the extent of the unpaid purchase money. The only questions are whether the purchaser can say that he had paid the whole purchase money and, if he did, whether he paid it before action."

Whatever determination may be made of the issues with Wells, the action must then fail at least as to the relief specifically prayed for against Quickfall.

As to Wells. On the correspondence and papers produced, amongst others Exs. 6 and 19, I am of opinion that Mr. Affleck was an agent to whom tender could be made for Wells, and that tender was made to him in proper manner; but the offer made to Wells personally at Lockport I hold not to have been a tender.

I may say, however, that, so far as Wells' disposition may be gathered from the correspondence filed and the very many grounds he urges in his defence (such as moving buildings, default in taxes, etc.) that are absolutely without any foundation of fact on his own showing when answering to interrogatories, his mind seems to have been made up to avoid and refuse tender. If that be so and even if no tender at all had been made, the case might still come within the proposition laid down by the Vice Chancellor in *Hunter* v. *Daniel*, 4 Hare, 433.

The question is whether the amount of $164.80, tendered to Mr. Affleck, was sufficient to cover the balance of the

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purchase price under the agreement, together with costs of deed from Wells to the plaintiff.

Unless the contrary be shown, the receipt dated January 19th, 1909, (Ex. 7) from Wells' solicitors to plaintiff's solicitors "For $190.75, being instalment due in November last with interest to date," must be taken as sufficient evidence that all previous instalments and interest on the agreement were duly paid. The only other instalment then remaining unpaid under the agreement was one for $150 due November 1st, 1909, with interest thereon at 6 per cent. On the date of the tender to Mr. Affleck, which was February 10th, 1910, there was then due on this instalment $162,—or with costs of deed, $167. Now only $164.80 was tendered. The tender was therefore short by $2.20.

The defendant Wells, however, claims $28.70 more for a balance of costs on cancellation proceedings instituted in 1908. The onus as to this part of the account is of course shifted on to Wells. I have nothing before me in this respect but two letters from Wells' solicitors (Exs. 14 and 15), and Wells' answers to interrogatories; but these only show that he claims that amount and not in any way that it is due him. I will then hold this last item not proved.

It is essential, when a purchaser asks for specific performance, that he should have paid or tendered the full amount of the purchase. It is only after performing his part, that he secures the standing which allows him to ask the Court to compel the vendor to perform his own.

The shortage of $2.20 in the tender is, however, so trifling that I do not think that this should stand in the way of granting the relief sought. *De minimis non curat prætor.* If there are cases where the rule may be overlooked or relaxed to this small extent, this seems to me to be one of them. The correspondence and papers filed show that the plaintiff was anxious to adjust matters and made

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several attempts to do so without receiving any response from Wells; and, moreover, that, pressed and urged by the latter and misconceiving her position, she has paid him $191.75 (See Ex. 7) to which he was not entitled in any way, and which she is bound now to pay over again to Quickfall or forfeit the property.

I will then grant the plaintiff the relief prayed for against Wells, at the same time protecting Quickfall's rights under the mortgage.

In order to finally determine all matters that I consider have been fully inquired into and that all parties have had the opportunity to fully meet, I will also, although the same is not specially prayed for, make a personal order for payment against Wells as to the money he has been paid in error by the plaintiff subsequent to the latter being served with notice of the mortgage, and also provide for the paying off of whatever may be due under the mortgage. I will provide for this under the plaintiff's prayer for further relief, and she will be allowed, should it be necessary, to amend her statement of claim accordingly.

There will be an order that, upon the plaintiff paying into Court to the credit of this cause the sum of $162 together with $5 costs of deed, defendant Wells convey to her within one month all his right, title and interest to and in the said land as the same stood on October 31st, 1903;

And that, on default by the said Wells to so convey his interest as aforesaid, there be an order vesting the same in the plaintiff subject to a lien under the mortgage for $320 (amount of two instalments of purchase price unpaid at the date of service of notice of the mortgage) with interest on same at six per cent. since November 1st, 1908.

Also, that after default by Wells as aforesaid, upon the plaintiff paying into Court to the credit of this cause the amount secured by lien under the mortgage as in the para-

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graph immediately preceding provided, less $167 which will then have been already paid in, but adding six per cent. on the latter amount to date, and also the costs of this action, defendant Quickfall discharge the mortgage within ten days, and the plaintiff may also sign judgment against Wells for $191.75 paid to him on June 19th, 1909, with legal interest since said date; and that, in case of default by Quickfall to discharge the mortgage as aforesaid, the same be declared discharged and be removed from the files of the Registry Office, with costs of proceedings on said default to the plaintiff.

The plaintiff to have in any event her costs of action against defendant Wells, and defendant Quickfall to have his costs against the plaintiff except in case of his default to discharge the mortgage as hereinabove provided.

LAMB v. NORTH.

Before ROBSON, J.

Partnership—Contribution between partners—Parties to action—Insolvency.

When a number of persons have joined in making a promissory note, all being equally liable, and one of them is compelled to take up the note, he may maintain an action for contribution and get judgment against any one of the others for his proportionate share of the amount without making the rest parties, or, if they have been made parties, without evidence as to the state of the cause as against them: *Lindley on Partnership*, 7th ed. p. 501.

If it is shown that some of the partners are insolvent, the rest may be bound to contribute a correspondingly greater proportion of the amount: *Dering* v. *Earl of Winchelsea*, (1787) 1 Cox, 318, White & Tudor's Equity Cases, 7th ed. vol. I, p. 535.

DECIDED: 31st May, 1912.

Statement.

TRIAL at Minnedosa sittings, 21st May, 1912.

Plaintiff and defendants in 1902, in partnership, purchased a stallion, giving four promissory notes of $937.50 each as the price.

The venture was not a success and the horse was return-

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Statement.

ed in satisfaction of two of the notes. Plaintiff paid the other two notes, his outlay in this connection being about $2,680.

The plaintiff brought this action to obtain contribution from the fourteen defendants. One defendant, William Convery, defended.

A. Leighton for plaintiff.

H. F. Maulson for defendant.

ROBSON, J. As I read the statement of claim it may be treated as a demand for payment of the proper shares of the burden or for an accounting of the partnership, the desired relief being reached in that way.

It did not appear in evidence that the defendants, other than Convery, had been served and ignored the suit, or, if so, what the nature of the default judgment, if any, against them was, so that a general accounting cannot be decreed on present materials.

The plaintiff says the horse did not pay expenses. There is no evidence to charge him with any moneys against his payment of the notes. The amount of this payment is not in doubt: I think I can apply the principle stated in *Lindley on Partnership,* 7th ed. page 501, as follows:

"But although, in an action for obtaining payment of a proportion of an unascertained sum, all the persons interested in that sum must, as a general rule, be parties, yet, where the sum to be divided is ascertained, and the shares into which it is to be divided are also ascertained, an action for the payment of one of those shares may be maintained without making the persons interested in the other shares parties."

The statement of claim alleges payment by plaintiff of $2135.13. Allowing interest to plaintiff, the common burden at the commencement of the action was $2,668.88, as computed in the statement of claim. This is within the amount plaintiff says he paid. *Prima facie* each of the fifteen partners should bear one-fifteenth of the $2,668.88.

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ROBSON, J.

Plaintiff, however, seeks to recover from the contesting defendant a greater proportion than one-fifteenth. He alleges that some of the partners are insolvent. The principle in equity is shown in *Dering* v. *Earl of Winchelsea,* 1 Cox, 318, one of *White & Tudor's* collection of *Equity Cases* (7th ed. vol. 1, p. 535) at page 539 of the latter volume. The judgment deals with the question. See also *Lowe* v. *Dixon,* 16 Q.B.D. 455. These authorities support plaintiff's contention, if the facts are as alleged.

There is no evidence of the insolvency of the other defendants. Statements were made by counsel, but these do not supply the want. The fact that a number of the other defendants have left the Province has no bearing on the question.

I was asked to refer the question of the solvency of the others.

Prima facie the proportion of the burden is according to the number of those liable. A plaintiff wishing to impose a greater burden upon any one of his partners is to that extent varying the cause of action, and should, I think, make out his case accordingly both by pleading and evidence. I do not think a precedent should be created for imposing upon a local master the duty of such an inquiry. This is a case in which the plaintiff is entitled to every legitimate assistance, but that would be going too far.

There will be judgment for the plaintiff against the defendant Convery for $177.92 and interest from the commencement of the action, with costs as against that defendant on the King's Bench scale without set off.

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IN THE COURT OF APPEAL.

SMITH v. ERNST. (No. 2)

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Vendor and purchaser—Specific performance—Land out of the jurisdiction—Purchaser with notice—Jurisdiction—Judgment in personam—Torrens Title—Damages—Statute of Frauds—Evidence.

The defendant Ernst sold the land in question, which was in Ontario, to the plaintiff by an agreement of sale which provided that, on the completion of the several payments, the land would be conveyed by a Torrens title to the plaintiff. After plaintiff had paid some of the instalments, the defendant Just took over the land from Ernst subject to the plaintiff's rights and notified the plaintiff of this and promised that, if the plaintiff would complete his payments, he, Just, would give him a Torrens title.

Held, CAMERON, J.A., dissenting, (1) This promise of Just was not "a contract or sale of lands, tenements or hereditaments, or any interest in or concerning them," but was a collateral agreement which might be proved by parol evidence and enforced notwithstanding the 4th section of the Statute of Frauds.

Jeakes v. *White*, (1851) 6 Ex. 873; *Angell* v. *Duke*, (1875) L.R. 10 Q.B. 174, and *Boston* v. *Boston*, [1904] 1 K.B. 124, followed.

(2) The trial Judge was right in awarding judgment for specific performance against Just and damages for his failure to procure a Torrens title, such damages to be the amount ascertained by the Master on a reference to be the cost of obtaining such title.

Held, also, that the Court had jurisdiction to decree specific performance of Ernst's agreement to convey the land against Just, since he obtained his title from Ernst after the plaintiff's purchase and with full notice of it.

Held, also, *per* RICHARDS, PERDUE and HAGGART, JJ.A., (1) The Court has also power to enforce specific performance in respect of lands out of the jurisdiction by a judgment *in personam* when the party resides within the jurisdiction.

(2) Sections 7 and 9 of the Statute of Frauds do not prevent relief being granted to the purchaser in such a case, because the vendor's alienee puts himself in the position of a trustee of the land for the purchaser, and cannot be permitted to avail himself of the Statute in order that he may commit a fraud.

Rochefoucauld v. *Boustead*, [1897] 1 Ch. 206, and *Haigh* v. *Kaye*, (1872) L.R. 7 Ch. 474, followed.

DECIDED: 10th June, 1912.

Statement.

ON the 6th September, 1907, the plaintiff entered into an agreement with the defendant Ernst to purchase from

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him two lots in the City of Port Arthur in the Province of Ontario, for the purchase price of $130, payable $10 in cash and $4 per month until the whole amount was paid. The defendant Just negotiated the sale on behalf of Ernst, who did not personally appear in the transaction at all.

In negotiating the agreement the plaintiff stipulated with Just that he should be given a Torrens Title to the land. When the first agreement was tendered by Just to the plaintiff for execution by him it did not contain this stipulation and the plaintiff refused to execute it. The defendant Just made the necessary change and it was then executed by the plaintiff.

The cash and all subsequent payments were made to the defendant Just, who gave receipts therefor in the name of The Canadian German Realty Co., per himself.

In May, 1908, after the plaintiff had paid the cash payment of $10 and eight of the monthly payments of $4 each, the defendant Just took a conveyance of the land in question with a quantity of other lands from the defendant Ernst, subject to the plaintiff's agreement. At that time Ernst had not a Torrens title to the land and of course did not convey by such title to the defendant Just.

The plaintiff continued to pay his monthly payments to the defendant Just as he had previously done, and received receipts in the same form; but thereafter the Canadian German Realty Co. received the moneys as agent for the defendant Just.

In December, 1909, the defendant Just told the plaintiff that he had taken over the land and asked him if he would accept an Old System title. The plaintiff declined to do so, and Just replied that he had a good mind not to receive the payment unless he consented to take an Old System title, but the plaintiff still refused, and Just then accepted the payment.

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After the plaintiff had made all the payments and demanded the title which his agreement called for, the defendant Just refused to give him a Torrens title, but offered an Old System title, which the plaintiff refused. Some negotiations then took place between them, which resulted in Just verbally agreeing to pay the plaintiff $250 for a release of his claim upon the land. The plaintiff verbally agreed to accept this amount in full discharge of his claim; but, after repeated promises to carry it out, Just refused to do so on the ground that he was not bound. The plaintiff then brought this action for specific performance, or for a return of the money and damages.

Plaintiff discontinued as against Ernst.

The action was tried before Mathers, C.J.K.B., who gave judgment for the plaintiff for specific performance of the contract.

Defendant Just appealed.

F. J. Sutton for defendant Just, appellant, cited *Penn* v. *Baltimore,* 1 Ves. Sr. 444; *Norris* v. *Chambres,* 29 Beav. 246; 3 De G. F. & J. 582; *Deschamps* v. *Miller,* [1908] 1 Ch. 856; *British* v. *Companhia,* [1892] 2 Q.B. 358; [1893] A.C. 602; *Gray* v. *Man. & N. W. Ry.,* 11 M.R. 62; [1897] A.C. 254; *Ross* v. *Ross,* 23 O.R. 43; *Cranstown* v. *Johnston,* 3 Ves. 170, 5 Ves. 277; *Norton* v. *Florence,* 7 Ch. D. 332; *Cote* v. *Olson,* 20 W.L.R. 690; *Young* v. *Kitchin,* 3 Ex. D. 127; *Newfoundland* v. *Newfoundland Railway Co.,* 13 A.C. 199; *Haywood* v. *Brunswick,* 8 Q.B.D. 403; *London & S. W. Ry.* v. *Gomm,* 20 Ch. D. 562; *Austerberry* v. *Oldham,* 29 Ch. D. 750; *Rock* v. *Wilson,* 52 L.J. Ch. 214; *Vagliano* v. *Bank of England,* 23 Q.B.D. 243; *Norris* v. *Jackson,* 1 Johns. & Hem. 318; 7 Jur. N.S. 540.

W. H. Trueman for plaintiff, respondent, cited *Williams on V. & P.* (2nd ed.) 570, and *Sugden on Vendors & Purchasers,* 271.

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HOWELL, C.J.M.

HOWELL, C.J.M. It seems to me a clear agreement can be made out from the evidence between the plaintiff and the defendant Just after the latter became the holder of the legal estate in the land. When he took the conveyance from Ernst he knew that his grantor had, by an agreement sufficient under the Statute of Frauds, contracted and agreed to sell to the plaintiff and, upon payment of the purchase money, to convey the land by way of a Torrens certificate. He knew, therefore, that the plaintiff was the equitable owner of the land and that he, the defendant, would be compelled to convey the land upon the plaintiff performing his part of the contract.

In this state of the matter the parties met and made a bargain, and I think the evidence justifies the conclusion that the defendant agreed that, if the plaintiff would pay the purchase money to him direct instead of to Ernst, he, the defendant, would take such proceedings with relation to his own title that, when the time came to convey, the title which he then had would be one under the Torrens system.

In other words, the defendant agreed that, if the plaintiff would make the payments, he, the defendant, would do something to his own title. It was an agreement that the defendant would do something to his own lands, as in *Angell* v. *Duke,* L.R. 10 Q.B. 174, where the defendant agreed that he would erect a building upon his own land, and it was held that this could be proved by parol evidence, although it greatly benefited the plaintiff.

In the case *Jeakes* v. *White,* 6 Ex. at 878, the defendant wished to borrow from the plaintiff the sum of £2,000, and it was verbally agreed that the plaintiff should search the defendant's title and, if not good, the defendant would pay the expenses. A search was made and the plaintiff claimed that the title was not good and

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HOWELL, C.J.M.

sued for the expenses. The Court did not entertain a plea of the Statute of Frauds and, after evidence was given as to the title, decided that the plaintiff's contention was the correct one and granted relief on the parol agreement.

Although the point in dispute relates to land in another country, the proof required here for the enforcement of the contract must, under the principles laid down in *Rochefoucauld* v. *Boustead,* [1897] 1 Ch. 207, be practically the same as if the land was in this Province; but I think, it being a bargain merely to do something to his own title, a parol contract is sufficient.

The appeal must be dismissed with costs.

PERDUE, J.A. The defendant Ernst had entered into a written agreement to sell to the plaintiff a parcel of land in the town of Port Arthur, Ontario. The purchase money was payable in monthly instalments and the vendor covenanted to give the purchaser a Torrens title to the land. The negotiations for the sale and the execution of the agreement were carried out by the defendant Just acting on behalf of Ernst. The plaintiff and Ernst did not personally meet each other in the transaction. The payment of the instalments of purchase money were made by the plaintiff to the defendants, the Canadian German Realty Company, who acted therein as agents for Ernst. Just was, at the time of the sale and afterwards, an employee or official of the Company and he signed the receipts for the payments in the name of the Company.

In May, 1908, after the plaintiff had made several payments under the agreement, Just obtained a conveyance of the land in question from Ernst. In his statement of defence Just claims that, at the same time, he obtained a verbal assignment from Ernst of the moneys payable under the plaintiff's agreement, but does not claim that he had any better title to them. The plain-

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PERDUE, J.A.

tiff continued paying his instalments to the Company and the latter paid the money to Just.

In December, 1909, Just informed the plaintiff that he, Just, had taken over the agreement and that the plaintiff would have to look to him for the Torrens title. At that interview the plaintiff paid an instalment to Just. In March, 1910, the plaintiff paid to Just the final instalment and when making payment demanded a Torrens title stating that he would take no other. Neither Ernst nor Just had obtained a Torrens title to the land and it would necessitate some expenditure to obtain one. Some negotiations took place between the parties with the object of arriving at a settlement by Just buying the plaintiff's interest, but these negotiations came to nothing.

In his statement of defence Just offers to convey to the plaintiff the title he has but refuses to procure a Torrens title. He takes the ground that the covenant given by Ernst to furnish a Torrens title is not binding upon him.

I am satisfied that the plaintiff's evidence of what took place between him and Just should be accepted as the true account of the transaction. It is clear that Just told the plaintiff that he had taken the whole thing over from Ernst and that he would give the plaintiff a Torrens title when the latter completed his payments. The plaintiff, relying upon this, paid the remaining instalments to Just. At that time Just, being the holder of the ordinary title, was the proper person to apply for and obtain a Torrens title in order to carry out Ernst's covenant to furnish such form of title to the plaintiff. Ernst was at that time regarded as out of the transaction, and Just believed himself to be liable to carry out Ernst's covenant. He actually agreed with the plaintiff so to do, the plaintiff carrying out the purchase on his part. This is the case for the plaintiff as disclosed by the evidence.

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Such a case was not distinctly set up in the statement of claim, but the trial Judge gave the plaintiff general leave to amend. The result, however, of such amendments would be that Just should also have leave to amend his statement of defence, and to plead the 4th section of the Statute of Frauds in respect of the promise made by him to the plaintiff in regard to furnishing the Torrens title. We must therefore consider this case as if the amendments had been made and the statute set up as a defence.

Was the agreement by Just to carry out Ernst's obligation and furnish a Torrens title to the plaintiff, "a contract or sale of lands, tenements or hereditaments, or any interest in or concerning them?" The plaintiff already had an agreement for purchase of the land sufficient to comply with the statute. Just had taken over the vendor's interest with the fullest notice of this agreement and was bound to convey to the plaintiff on the purchase money being paid.

It is clear that specific performance of the agreement for sale of the land can be enforced against Just as having obtained his title from Ernst subsequently to the plaintiff's agreement and with full notice of it: *Dart on V. & P.*, 7th ed. 1030. The difficult question arises, is Just not only bound to convey the land, but is he also compellable to furnish a Torrens title? Neither party can assign the burden of the contract. Equity enforces the contract as against a subsequent purchaser with notice on the ground of trusteeship and not on the ground that he has undertaken the performance of the contract: *Dart on V. & P., supra.*

Where Just was already bound to convey, the promise to give a Torrens title was something collateral to his obligation. A Torrens title is one in which the title to land is registered in accordance with a statutory procedure. It does not give any estate or interest in land different from the ordinary title. It is something which

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the holder of a good title under the old system may procure for himself by making application under the statute. It is something which such owner may do in respect of his land which will have the effect of evidencing his title in a simple and effectual manner, but which in no way increases, diminishes or affects the estate or interest which he possesses in the land.

In *Jeakes* v. *White,* 6 Ex. 873, the declaration set up a contract whereby the defendant, in consideration of a promise to lend a sum of money on a mortgage of defendant's land, on his making a good title, promised to pay the expense of investigating the title, if the same should prove defective. It was held that the contract did not relate to an interest in land and was not within the statute.

In *Angell* v. *Duke,* L.R. 10 Q.B. 174, it was held that a collateral agreement that, in consideration of accepting a lease or tenancy upon certain terms, the landlord would do repairs and put in furniture, was not within the statute, because it did not import any obligation to take or give the lease or tenancy. This, it appears to me, is very close to the present case. The defendant Just does not agree to sell the land or any interest in it to the plaintiff. But Just does agree for a sufficient consideration that land now standing in his name shall be placed under the Torrens system. This does not create any obligation upon Just to sell or convey the land or any interest in it. Such obligation is created in another way through the equitable doctrines of the Court.

In *Boston* v. *Boston,* [1904] 1 K.B. 124, a request made by a wife to her husband to purchase the residue of a term of years in a house, and a promise to repay him the money expended in making the purchase, was held by the Court of Appeal to be outside the statute. The ground of the decision was that the husband was not

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bound to buy and the agreement was not therefore one for the purchase of an interest in land.

All that the plaintiff seeks to enforce against Just under the agreement with the latter is damages for refusing to furnish a Torrens title. He does not seek to enforce any contract with Just for the sale of the land or of any interest in it. He seeks to enforce an agreement in which Just said in effect: "When you have paid to me all the purchase money you agreed to pay to Ernst and when I become, as I shall then become, liable to convey the land to you, I will give you a Torrens title." I think that such agreement was, under the circumstances, not within the fourth section of the Statute of Frauds. Upon the reasoning set out in the above cases, this agreement did not bind Just to convey. He was, however, liable by reason of his trusteeship for the plaintiff to convey the land to the plaintiff. When the Court orders him so to convey the land, as it does in this case, he may be made liable also in damages for his refusal to give a Torrens title. Assuming, as we may, that the title to the land is good, the procuring of such a Torrens title is merely a matter of expense and the damages for refusing to furnish such a title would be simply the cost of bringing the land under the Act.

I think the objections raised to the jurisdiction of the Court to pronounce the judgment appealed from must fail. I would dismiss the appeal with costs.

CAMERON, J.A. This is an action for specific performance of an agreement for the sale of lands situate in Port Arthur, Ontario, originally made between the plaintiff as purchaser and the defendant Ernst as vendor. This agreement contained a covenant on the part of Ernst to give a Torrens title to the lands. The lands mentioned in the agreement, after its date and before the payments thereunder were fully made, were sold and

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conveyed by Ernst to the defendant Just. This conveyance does not appear to be in evidence.

The action is really directed against Just to compel him specifically to perform the covenant made by Ernst (or the agreement made by himself) to give a Torrens title to the plaintiff. The learned Chief Justice, who tried the action, gave a judgment for specific performance against Just, and directed that all amendments to the statement of claim, necessary to give the plaintiff relief, should be made. It would follow from this that the defendant must be held at liberty to plead any appropriate defences, such as the Statute of Frauds, to such amendments.

There was no written agreement between the plaintiff and Just, signed by the latter, alleged or proved. When the plaintiff paid Just the final instalments on the agreement with Ernst, Just told the plaintiff that he (the plaintiff) "would have to look to him (Just) for the Torrens title" and it was on this understanding, according to the plaintiff, that he made the payments to Just. Later, on cross-examination, the plaintiff said:

"A. He (Just) has promised all along that he would give the Torrens title.

"Q. He did? A. Yes.

"Q. When did he promise that? A. Well, he promised when I made the different payments."

The Chief Justice does not directly find the existence of an oral agreement on the part of Just to give a Torrens title, but that, in his opinion, there was such is the effect of his judgment.

Now, it being taken for granted that the defence of the Statute of Frauds is here pleaded by Just to the statement of claim, as amended (and that amendment must certainly be allowed him), what answer is there to it? The covenant or agreement to give a Torrens title to

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these lands is, to my mind, a covenant or agreement relating to land within the meaning of the statute. It follows, therefore, that Just, having neither adopted Ernst's covenant over his own signature, nor entered into and signed a new and independent agreement similar thereto for himself, is not bound by either.

I have read the cases of *Angell* v. *Duke,* L.R. 10 Q.B. 174, and *Boston* v. *Boston,* [1904] 1 K.B. 126. I think these are clearly distinguishable.

In the former case the promise to repair and provide material on the part of the landlord was made as an inducement, or consideration, to the plaintiff to enter into the lease.

"It (the promise) is collateral and therefore I do not see, if the plaintiff had refused to become tenant, or the defendant had refused to let him the house, that either would have had a cause of action against the other. The defendant says, in order to induce the plaintiff to complete the tenancy: 'When you have become tenant I will put the house in repair and buy in the furniture.' No obligation arose until the consideration had been executed by the plaintiff entering and becoming tenant," per Lush, J., 178. I cannot see how the promise here, either on Ernst's part or on the part of Just, who stepped into Ernst's shoes, can be considered collateral. It was a vital and essential term of the contract for the sale of the lands and not separate from it or collateral to it. "If the contract alleged is a contract containing any material term which amounts to a sale of an interest in land, then all the other terms subordinate to it must stand or fall with it": *Ib.* The contract between Smith and Ernst was a contract for the sale of lands with the covenant for a Torrens title an essential subordinate term of it. The position of the parties and the elements of the agreement were not altered by the conveyance of the lands by Ernst to Just, who is bound in law to convey his interest

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to the plaintiff and who bound himself verbally to give the plaintiff a Torrens title.

In *Boston* v. *Boston, supra,* a wife requested her husband to buy the residue of the lease of a particular house, promising to pay him the amount of the purchase money. It was held that this was not a contract to which the Statute of Frauds applied. But the husband did not contract to acquire any interest in land, and the case is clearly outside the statute.

The view is taken that Just, on condition that the final payments of purchase money were made to him, in fact agreed to do no more than secure a certificate of title to his own lands under the Torrens system, and that this agreement has the same legal effect as if he had agreed to make repairs to, or provide furniture for, a house. But I cannot see that that was really the agreement. The agreement on Ernst's part and, afterwards, on the part of Just, was to convey to the plaintiff by a transfer under the Torrens system. That was the real agreement: to convey, not to secure a certificate of title. And that this agreement was regarded as an essential element of the contract of sale clearly appears on the evidence.

For another reason, I think it cannot be said that this case comes within *Angell* v. *Duke.* There the landlord agreed to repair and provide furniture upon his own property. That is not the case here. Let us for the moment consider the securing of a certificate of title under the Torrens system as being of the same character as adding a bay-window to a house. But here the land is not Just's. He did not make an agreement to improve the desirability or convenience or sightliness of his own property. This land was, in reality, the property of the plaintiff at the time of the conveyance to Just and is now.

In his defence, Just declares his willingness and readiness to convey his interest in the land to the plaintiff.

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He admits he has no interest in it. The agreement to give a Torrens title to the land was not an agreement in respect of Just's land, but in respect of land the ownership of which was and is in the plaintiff. It seems to me, therefore, with all due respect, impossible to bring this case within the decision in *Angell* v. *Duke*.

I am of opinion that the agreement in respect of which it is attempted here to hold Just liable is within the Statute of Frauds, and that the action must fail. This result is a plain hardship on the plaintiff but, in my view, it is unavoidable.

HAGGART, J.A. The defendant Just on his appeal asks to have the judgment of the trial Judge varied by limiting the relief granted to a conveyance only of such interest as Just actually acquired from Ernst; and the grounds upon which he relies were that the land was outside the jurisdiction, that Ernst was outside the jurisdiction, that there was no privity of contract between the plaintiff and the defendant Just; that Just was not liable beyond the extent of the interest he acquired from Ernst, and that the lands were not taken subject to the plaintiff's agreement for purchase.

I agree with the learned Chief Justice of the King's Bench that the Court has jurisdiction to enforce specific performance against the vendor and against the vendor's alienees, if they purchased with notice of the prior contract: *Dart on V & P.* 1030; *Daniels* v. *Davison,* 17 Ves. 433.

I also agree with the learned Chief Justice that the Court has power to enforce specific performance in respect of lands outside of the jurisdiction when the parties themselves reside in the Province.

It was urged by the defendant Just that the covenant in the original agreement to furnish to the purchaser a Torrens title was not binding on the vendor's alienee; that only covenants restricting the mode of using the

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lands will be enforced; but that covenants to do positive acts, that impose a burden that can only be complied with by the expenditure of money, are not binding on the alienee, and authorities were cited to show that in actions for breach of such covenants such was held; but the circumstances here are different from those in the several cases cited in support of the foregoing proposition.

The facts here are that Just negotiated the sale with the plaintiff, arranged the terms, inserted in the writing the provision for a Torrens title as insisted upon by the plaintiff, witnessed the execution of the agreement by both parties, closed the sale, received the first payment, and, either personally or as an officer of the Canada German Realty Co., received all the subsequent payments and signed the receipts for all of the purchase money. Just was really the only person whom the plaintiff knew in the transaction. Just told Smith of his taking over the property from Ernst. He admitted to Smith that he, Smith, was to get a Torrens title and he accepted the last payment reluctantly after a discussion between them as to this very stipulation, and even made an offer in money to be relieved from carrying out the sale.

In common fairness there ought to be some remedy for the plaintiff other than an action against Ernst, who has left the country and who might be considered non-existent so far as this transaction is concerned.

Now, not only did Just become alienee of the interest of Ernst in the land, but he became a trustee for the purchaser and accepted and assumed the burden of that trust relationship which exists between the vendor and purchaser of real estate. The simple transfer of the interest he acquired from Ernst, which he offers, would not be an execution of that trust. The $130 mentioned in the agreement and which has been paid by the plaintiff in full was the consideration, not for Ernst's interest or title, but for the land with a Torrens title. It was a

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lump sum, and Just collected that money with full knowledge as to what was bargained for.

Dart on V. & P., 1030, above cited, lays down this proposition:

"Equity will enforce specific performance of the contract for sale against the vendor and also (on the footing, not of contract, but of trusteeship) against the vendor's alienees for value if they purchased with notice of the prior contract."

Now, as the plaintiff is asserting the existence of a trust and asking relief as a beneficiary, we are called upon to consider the effect of sections 7 and 9 of the Statute of Frauds. Section 7 enacts that all declarations or creations of trusts in lands must be manifested and proved by writing. Section 9 limits this by enacting that, where any conveyance shall be made of any lands or tenements by which "a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then such trust or confidence shall be of like force and effect as the same would have been if this Act had not been made."

It is not sufficient to say that it is unfortunate for the plaintiff that he is placed in the position of having paid what he bargained for without any hope of his getting what was agreed to, and that Just can now take the benefit of what he never would have received without assuming the burden. We must assume that Just contemplated and designed the results of the transaction and that result is a fraud upon the plaintiff which this Court will relieve against.

If, then, this is a fraud, the *dictum* of Lindley, L.J., in *Rochefoucauld* v. *Boustead,* [1897] 1 Ch. 206, is in point:—

"It is a fraud upon the part of a person to whom land is conveyed as a trustee, and who knows it was so

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conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming the land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of the conveyance and the statute, in order to keep the land himself."

As also the words of Sir W. M. James, L.J., in *Haigh* v. *Kaye,* L.R. 7 Ch. 474:—

"I apprehend it is clear that the Statute of Frauds was never intended to prevent the Court of Equity from giving relief in a case of plain, clear and deliberate fraud," and Lord Justice Turner in *Lincoln* v. *Wright,* 4 De G. & J. 16: "The principle of this Court is that the Statute of Frauds was not made to cover fraud."

Again, is not this the substance of the transaction? The consideration in the agreement, $130, is for the land and for the procuring of a title evidenced by a Provincial Certificate. It requires $55 of this money to procure this Certificate. The vendor has received this $55. Is the purchaser not entitled to have this money so expended or to have it returned to him? The 4th, 7th and 9th sections of the Statute of Frauds do not take away that right. See *Angell* v. *Duke,* L.R. 10 Q.B. 174; *Boston* v. *Boston,* [1904] 1 K.B. 124; *Morgan* v. *Griffith,* L.R. 6 Ex. 70.

I would dismiss the appeal and affirm the judgment of the Chief Justice of the King's Bench.

RICHARDS, J.A., concurred with HOWELL, C.J.M.

Appeal dismissed.

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In the Court of Appeal.

Whaley v. O'Grady, Anderson & Co.

Before Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A.

Principal and agent—Company—Authority to Agent—Contract to re-purchase shares sold—Rescission of contract—Recovering back money paid—Misrepresentation.

An agent of the defendants, a company incorporated under The Manitoba Joint Stock Companies Act, sold the plaintiff a number of shares of stock in another company, at the same time giving him, with the authority of the vice-president of the defendants, an agreement to re-purchase the shares on a date named and at an advanced price, if the plaintiff desired to sell. Afterwards, on the plaintiff calling on the company to re-purchase, it appeared that there had been no authority given to the vice-president to empower the agent to enter into any such bargain.

Held, that the representation by the defendants' agent to the plaintiff that the defendants would re-purchase the shares, was a part of the contract of sale of the shares carried out by the defendants and that the defendants having received the purchase money should be compelled to restore the plaintiff to his original position by repayment of what he had paid for the shares with interest on his re-assigning them to the defendants.

Decided: 24th June, 1912.

Statement.

Action to recover damages for breach of an agreement to re-purchase stock which the defendants had sold to the plaintiff.

The following judgment at the trial was delivered by

Macdonald, J. The plaintiff purchased from the defendant Company ten shares of The Gas Traction Company, Limited, at one hundred dollars per share. The sale was made through one H. V. Lyon, a stock salesman, in the employ of the defendant Company.

At the time of the sale Lyon, acting on behalf of the defendant Company, entered into the following agreement (Ex. 1), with and addressed to the plaintiff:

"This is to certify that, in consideration of Matthew Whaley taking 10 shares of Gas Traction Co. stock, we

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agree to re-purchase same from you 1st January, 1911, at $115 per share if you desire to sell same.

Yours truly,
O'Grady, Anderson & Co.
per H. V. Lyon."

In the margin of this agreement is written the following:

"If you are dissatisfied when you inspect factory in 10 days we will return your ck. & note and cancel subscription. H. V. Lyon."

Lyon claims to have authority by a letter (Ex. 2) given him by Mr. Anderson as Vice-President of the defendant Company, which letter reads as follows:

"H. V. Lyon, Esq., City. Dear Sir:—In reference to your desire to guarantee to certain investors in stock of the Gas Traction Co., Ltd., that you will repurchase their stock at $125 in January, 1911, if such party desires to sell, we may say that we will stand behind you in this project providing we are given the dividend for the year 1909 if we are asked to buy.

Yours very truly,
O'Grady, Anderson & Co., Ltd.
V. Pres."

On the strength of this agreement to re-purchase (Ex. 1) the plaintiff gave his cheque to Lyon for one thousand dollars for the ten shares, which in due course was received by the defendant Company; the plaintiff, however, stopped the payment of this cheque by telling his banker not to pay it until he had returned from Winnipeg. His banker at the time advised him that the defendant was a joint stock company and he, the plaintiff, was to see if the agreement executed by Lyon was authorized by the Company.

The authority, (Ex. 2), given by Mr. Anderson was given without the knowledge or consent of Mr. O'Grady, who was the president of the defendant Company, nor does it appear from the evidence that any one connected with the Company was consulted with respect to

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this authority given to Lyon; this latter gentleman, who claims to be a member of the legal profession, cannot very well be justified in saying that he took it for granted that everything was in proper order and his authority complete.

Sales of stock of the same company were made by Lyon to a number of others on terms similar to those upon which it is claimed the stock was sold to the plaintiff, which stock the defendant Company re-purchased; and as soon as the agreement (Ex. 1) came to the knowledge of Mr. O'Grady, the president of the defendant Company, he took exception to it and ordered that sales of stock on such a condition be stopped and the authority under which such an agreement was made be withdrawn. This action on the part of Mr. O'Grady was communicated by letter to Lyon, and received by him prior to the closing of the agreement with the plaintiff by payment for the stock purchased by him.

After the receipt by Lyon of this letter he, in company with the plaintiff, called at the office of the defendant Company in the City of Winnipeg and, after having visited the factory of the Gas Traction Company, had an interview with Mr. Anderson. What that interview was is not made clear, but, whatever it was, Mr. Anderson told the plaintiff he could take the stock or not and tore up the cheque which the plaintiff had first made out in payment of his stock. The plaintiff then expressed himself as satisfied to purchase the stock and a new cheque was made out and signed by him in payment of the stock, but he says it was on the understanding that the agreement to re-purchase (Ex. 1) would be adhered to, and in this he is corroborated by Lyon. Although on this point the evidence of both plaintiff and Lyon is extremely weak, and particularly in the face of the fact that Lyon had in his possession at the very time the letter forbidding further sales on the strength of agree-

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MACDONALD J.

ment to re-purchase (Ex. 1), and said nothing to the plaintiff about it either on his journey to Winnipeg or in Winnipeg, yet, as their evidence is not denied, I suppose I should accept it; but I hold without hesitation that Mr. O'Grady was not present and had no knowledge of, and was not a consenting party to, any such an agreement, and if such an agreement was made it was between Anderson and the plaintiff. The plaintiff brings this action for breach of the agreement to re-purchase (Ex. 1).

Assuming then that the sale to the plaintiff was on the strength of the agreement (Ex. 1), is the defendant Company, which is a corporate body incorporated under The Manitoba Joint Stock Companies Act, bound by this agreement?

It is a well understood and settled rule of law, subject to one or two exceptions, that a body corporate is not bound by any contract which is not under its corporate seal: *Pollock on Contracts,* 6th ed. 142. The seal is required as authenticating the concurrence of the whole body corporate.

"If the Legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance." "In other cases the seal is the only authentic evidence of what the corporation has done or agreed to do." "Every member knows he is bound by what is done under the corporate seal and nothing else:" *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 822.

The plaintiff relies on section 64 of The Manitoba Joint Stock Companies Act as dispensing with the necessity of a seal.

"Every contract, agreement, * * * made on behalf of the Company by any agent, officer or servant of the Company in general accordance with his powers as such agent,

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officer or servant under the by-laws of the Company or otherwise, shall be binding upon the Company; and in no case shall it be necessary to have the seal of the Company affixed to any such contract." etc.

It cannot be successfully urged that Lyon was acting in general accordance with his powers unless the letter given him by Mr. Anderson invested him with such powers.

There is nothing in the articles of incorporation investing Anderson, expressly or impliedly, with the authority to bind the Company, nor does this section 64 invest him with such authority. In my opinion it does not. It is not an act done by him in general accordance with his powers. There is nothing to show that he had such authority even from the directors, and he did not, it is proved, have the authority of the president and, even if he had, this is not such a transaction in the ordinary course of the defendant Company's business under its charter, as could be binding upon the Company unless the agreement was legally executed under its seal.

The plaintiff was warned before closing the matter that the Company was a corporate body and he was to see if the Company authorized the agreement. Had he taken proper precautions, he could readily have seen that the Company could not be bound by Mr. Anderson's assurance that the agreement upon which he now depends would be carried out, nor would it be any more effective if that assurance was endorsed by Mr. O'Grady, the president.

The action must be dismissed with costs.

Plaintiff appealed.

W. J. Cooper, K.C., and *A. Meighen* for plaintiff, appellant, cited *McEdwards* v. *Ogilvie*, 4 M.R. 1; *Muldowan* v. *German-Canadian Land Co.*, 19 M.R. 667; *Thompson* v. *Brantford*, 25 A.R. 340; *French Gas Co.*

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Argument.

v. *Desbarats*, 1 Dom. L.R. 137, and *Foley* v. *Barber*, 16 O.W.R. 607.

J. B. Hugg for defendants, respondents, cited *Sheppard* v. *Bonanza*, 25 O.R. 305, and *Muldowan* v. *German-Canadian Land Co.*, 19 M.R. 671.

HOWELL, C.J.M. It is conceded by all parties that Lyon was the defendants' agent to sell stock and that the latter was a joint stock company empowered by their charter to buy and sell stock in joint stock companies and generally to act as financial brokers and agents.

Lyon entered into the contract which is set forth in Mr. Justice Macdonald's judgment, believing he had power to do so, and before he had any notice of the revocation of the term as to re-purchase. If he had no authority to contract for the re-purchase of the stock, he was at all events the agent of the defendants to sell.

Even if the sale made by Lyon was re-considered between the vice-president Anderson and the plaintiff in Winnipeg, it seems from the evidence that the sale was made on the same terms as the first one and I think this is the finding of the trial Judge. He, however, goes on to hold that, because of there being no by-law, there was no power to add the condition of re-purchase.

Mr. Anderson wrote two letters in the name of the Company referring to the agreement, as if the original one made by Lyon was the real contract for the sale of stock to the plaintiff. These letters are dated December 20, 1910, and January 12, 1911, and there is no pretence that the vice-president had not full authority to bind the Company by the letters.

In the 9th paragraph of the statement of defence there is a distinct statement of record that the sale was made by Lyon and that he was the authorized agent to sell. The defendants are bound by this, but in that paragraph they repudiate his power to make the re-purchase agreement.

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On the argument the defendants relied strongly on section 68 of the Joint Stock Companies Act, R.S.M. 1902, c. 30, and claimed that no by-law, as required by that section, had been passed, and that, therefore, Lyon got no power under section 64 to enter into that portion of the contract relating to re-purchase. Certainly the vice-president assumed to give him power so to do, but let us examine the defendants' contention. Their agent to sell entered into a contract that cannot be carried out, without any notice or knowledge of this inability to the plaintiff. The Company took the plaintiff's money and thus carried out part of the agreement. If Lyon had defrauded or made any fraudulent representation to the plaintiff, the defendants would be bound to make it good as in *Kettlewell* v. *Refuge Ass. Co.*, [1608] 1 K.B. 545, affirmed in [1909] A.C. 243.

If the sale was of a chattel and "if the agent has deceived the third party, the person so deceived may, on finding out the fraud, retain the chattel and bring an action for any damage he has suffered, or can insist upon being restored to his original position": *Wright's Principal and Agent,* 418.

The defendants sent out their agent to sell stock and they are answerable for the manner in which that agent has conducted himself in doing the business which they authorized him to do.

Lyon represented that the defendants had power to re-purchase, and would re-purchase this stock, which representation was a part of the contract of sale carried out by the defendants, and they received the purchase price. I see no difficulty in compelling the defendants to restore the plaintiff to his original position.

Upon the plaintiff executing and leaving with the Prothonotary an assignment of the stock to the defendants, or their nominee, in form to the satisfaction of that officer, the defendants shall pay to the plaintiff the sum

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HOWELL, C.J.M.

of $1,000 and a further sum equal to interest thereon at 5 per cent. from January 10th, 1911, to the date of the entry of this judgment, and the judgment in the Court of King's Bench will be varied accordingly and the plaintiff must be given the costs of the trial and judgment.

The appeal is allowed with costs.

HAGGART, J.A. I have read the reasons of his Lordship the Chief Justice and agree with his conclusions.

The substance of the transaction in question was the payment by the plaintiff of $1,000 for ten shares of stock and an undertaking to re-purchase them on a certain future date at an advance of 15 per cent.

If, as claimed by the defendants, the agent Lyon had no authority to give this undertaking, or if the defendants under their letters patent, or the provisions of The Manitoba Joint Stock Companies Act, had no power to make this re-purchase, then there was no real agreement between the parties. This $1,000 is traced into the treasury of the defendants. The plaintiff is entitled to recover that sum with interest from the time of the demand on the defendants to re-purchase.

The appeal should be allowed.

RICHARDS, PERDUE and CAMERON, JJ.A., concurred.

Appeal allowed.

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IN THE COURT OF APPEAL.

ZDAN v. HRUDEN.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Damages—Breach of contract to support for life—Annuity—Lien or charge on Land.

An agreement by one party to support another during life is an entire continuing contract; and, upon a total breach thereof, the latter may recover at once full and final damages, *i.e.* not only the expenses of support up to the time of trial, but also the prospective expense during life.

Schell v. *Plumb*, (1874) 55 N.Y. 592; *Amos* v. *Oakley*, (1881) 131 Mass. 413, and *Parker* v. *Russell*, (1882) 133 Mass. 74, followed.

In such a case the plaintiff is not entitled to judgment for payment of an annuity during his life by the defendant.

Although the consideration given for such an agreement was a conveyance of land, the plaintiff is not entitled to a lien or charge on the land for the amount awarded him for damages for the breach of the agreement.

DECIDED: 24th June, 1912.

Statement.

ACTION for damages for breach of an agreement made by the defendant with the plaintiff, in consideration of a conveyance of the plaintiff's farm and a surrender of all his personal property to the defendant, to maintain the plaintiff and his wife for the rest of their natural lives.

The following judgment at the trial was delivered by

MACDONALD, J. The plaintiff was on the 28th June, 1908, the owner of the north east quarter of section 30 in township 18 in range 12 west of the principal meridian in the Province of Manitoba, and on that date he executed a conveyance of the lands to the defendant, and, although the deed of conveyance recites the consideration as being eleven hundred dollars, the plaintiff alleges that there was a further consideration that the defendant was to support him and his wife, who are both old and illiterate, for the rest of their natural lives. This further consideration is denied by the defendant, but the agree-

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ment subsequently entered into between the parties corroborates the plaintiff's evidence.

For two years after the conveyance of the lands the plaintiff and his wife resided with the defendant, and during that time were satisfied with the treatment received and assisted in providing material comforts from cattle and fowl owned by the plaintiff, and allowed to remain on what was then the defendant's farm without any arrangement with respect to the keep and housing of the said cattle and fowl. The plaintiff was also the owner of some farm implements and of the furniture in the house on the farm which was used by all the inmates of the house in common. Some differences arose between the plaintiff and the defendant as to the ownership of the cattle and implements, the defendant claiming a part as having passed to him in the conveyance of the land. These differences were settled by an agreement in writing entered into by them in March, 1909, by which agreement the plaintiff surrendered to the defendant all his equity in the lands and also all his implements, cattle and fowl then possessed by the plaintiff, and in consideration thereof the defendant agreed to keep the plaintiff and his wife for the rest of their natural lives, and to provide all the necessaries of life for the plaintiff. The agreement further provided that the plaintiff was to live with the defendant.

It was further provided that, in the event of the defendant selling the said described lands and not providing for the plaintiff, a settlement should be made by arbitration if possible.

After the execution of this agreement the defendant became the owner of all the plaintiff's earthly possessions and the plaintiff was entirely at the mercy of the defendant, upon whose treatment the peace of mind of the plaintiff and his wife depended.

Having thus become possessed, the defendant almost

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immediately began making matters disagreeable, differences became numerous and police court proceedings and counter proceedings were prosecuted, until it became an utter impossibility for them to live under the same roof; and, although the plaintiff may not have been free from blame, yet the defendant was the chief aggressor. He denied the plaintiff and his wife the common ordinary necessaries of life, denying them even the indispensable item of fuel during the cold weather and otherwise behaving in a manner betraying his self imposed duty of caring for the plaintiff and wife in a manner fitting their lowly station in life.

I find that the defendant has by his conduct been the means of a breach of the agreement referred to and has made it impossible for the plaintiff and his wife to reside with him, but his legal duty still exists and the spirit of the agreement must be carried out. The defendant says that it cost him ten dollars a month to maintain the plaintiff and his wife in his own household. It cannot, therefore, be any hardship upon him to support them to a slight extent beyond that amount elsewhere than in his own household and, taking into account the station in life of the parties, I do order that the defendant pay the plaintiff one hundred and fifty dollars a year during the natural lives of the plaintiff and his wife and, on the death of either, the sum of one hundred dollars a year to the survivor during the term of his or her natural life, such annuity to be a charge upon the lands hereinbefore described, and payment thereof to be made on the 1st day of October in each year.

Costs to the plaintiff.

Defendant appealed.

W. J. Cooper, K.C., and *A. Meighen* for defendant, appellant, cited *Wolf* v. *Tait*, 4 M.R. 59, and *Mayne on Damages*, pp. 11, 126.

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Argument.

A. C. Campbell for plaintiff, respondent, cited *Remington* v. *Devcrall*, 2 Anst. 550; *Swainson* v. *Bentley*, 4 O.R. 572, and *Blair* v. *Smith*, 1 M.R. 5.

The judgment of the Court was delivered by

CAMERON, J.A. In this case there was established on the evidence a contract on the part of the defendant to support the plaintiff and his wife during their lifetime and the lifetime of the survivor and a final breach of that contract. This contract was an entire continuing contract. In such a case the plaintiff is entitled to his full remedy without being driven to the necessity of bringing successive actions. "For breach of a contract to support for life an action lies as soon as there has been a definite default, and such damages may be recovered at once as will compensate the plaintiff, not only for the past, but for the future": *Parsons on Contracts*, 211, note, and the cases there referred to. In *Schell* v. *Plumb*, 55 N.Y. 592, it was held by the Court of Appeals of the State of New York that "An agreement by one party to support another during life is an entire continuing contract: and upon a total breach thereof the latter may recover full and final damages, *i.e.* not only the expenses of support up to the time of trial, but also the prospective expense during life." This case was decided in 1874. In *Amos* v. *Oakley*, (1881) 131 Mass. 413, it was held, "If this was a continuing contract for the plaintiff's life, it was also entire in its character, and a complete breach would justify the plaintiff in treating it as absolutely at an end and in seeking a remedy which should give him an equivalent in damages for its value. * * * The plaintiff was not obliged to renew a contract once broken by the default of the defendant, either by making subsequent demands, or accepting support afterwards tendered." In *Parker* v. *Russell*, (1882) 133 Mass. 74, a contract for support was also under consideration. It was there held that, "If the breach has been such that

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the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he so elects to treat it, the damages are assessed as of a total breach of the entire contract." "When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind, and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death."

These decisions seem to me founded on sound sense and to be applicable to the case before us. I would fix the plaintiff's damages, once for all, at $400. In my opinion no lien on the defendant's property can be established and I think the registration of the *lis pendens* and the judgment should be vacated. I would vary the judgment entered at the trial accordingly. There will be no costs of this appeal.

IN THE COURT OF APPEAL.

RURAL MUNICIPALITY OF MINTO v. MORRICE.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Taxation of land—Assessment Act, R.S.M. 1902, *c.* 117, *ss.* 13 and 31—*Assessment of Provincial lands—"Unpatented" lands, what are—Provincial Lands Act, R.S.M.* 1902, c. 135, *s.* 15—9 *Edward VII, c.* 36., *s.* 5—*Statutes, construction of.*

1 Under sections 13 and 31 of The Assessment Act, R.S.M. 1902, c. 117, if land is in fact "unpatented", it is imperative that the assessment roll should so state and, without an entry therein to that effect, the proceedings towards taxation are so deficient that an action will not lie against the owner at the suit of the municipality to recover the taxes attempted to be levied.

Haisley v. *Somers*, (1887) 13 O.R. 600, followed.

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2. Lands vested in the Crown in the right of the Province and being administered under the Provincial Lands Act, R.S.M. 1902, c. 135, although they have been acquired through a railway company from the Crown (Dominion) by letters patent or legislative grant, are to be deemed to be "unpatented" within the meaning of the Assessment Act until the issue of letters patent or a transfer under the Real Property Act by the Provincial Lands Commissioner, although they have been sold under agreement to the person assessed.

3. The statute 9 Edw. VII, c. 36, s. 5, legalizing and confirming all assessments made in rural municipalities for the years 1908 and 1909 which were based upon the assessment rolls for 1907, cannot be interpreted as legalizing an attempted assessment for such previous year not made in accordance with the law: *Endlich on Statutes*, par. 385.

DECIDED: 17th June, 1912.

Statement

THE plaintiff Municipality sued to recover from defendant $424.84 taxes against section 35, township 16, range 17, west, for the years 1908, 1909, 1910 and 1911, with penalties for non-payment of the taxes for the three first-mentioned years.

The parties agreed upon a statement of facts.

The following judgment at the trial was delivered by

ROBSON, J. I infer from the admissions that the land was among those embraced in the agreement between the Crown (Manitoba) and the Manitoba and North Western Railway Company, appearing in 62 & 63 Vic. (Man.), cap. 19, and mentioned in section 2 of the Provincial Lands Act. The lands were probably granted by the Crown (Dominion) under legislation such as 48-49 Vic., cap. 60, and 49 Vic., cap. 11. A certificate of title was issued to the Crown (Manitoba), 28th June, 1905, and so remains.

The land was Provincial land within the Provincial Lands Act. Defendant had agreed to purchase. He has paid part of the purchase money. The agreement is still extant. One of the defendant's contentions is that the land was "unpatented lands" within the meaning of the Municipal Assessment Act and that the assessments are void in that, as the fact is, they did not state that the land was unpatented.

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Taxes may be recovered by distress, by sale of the land or in action of debt. The interest of a person holding a contract of sale of provincial lands may be affected by a municipal tax sale; Provincial Lands Act, s. 16. The construction of the taxing provisions will be the same, whichever method of recovery may be adopted. In *Haisley* v. *Somers,* 13 O.R. 600, at 605, Proudfoot, J., states the principle of construction in such cases. I take it to be simply that the requirements of a taxing statute are imperative in the absence of a contrary intendment.

By section 13 of the Municipal Assessment Act the assessor is required, after diligent inquiry, to proceed to make a valuation of all the rateable property in the municipality and to make an assessment roll "in which he shall set forth correctly all the particulars and information required to be contained in order to comply with the form in Schedule A * * * in case of a rural municipality."

The form Schedule A required a statement of whether the land was patented or unpatented.

Section 31 of the Act reads as follows:—

"31. In the case of unpatented lands, there shall be an entry made on the assessment roll showing that the same are unpatented, and that the assessment is made in respect of such right, interest, estate, business or occupation of the occupant as aforesaid, but it shall not be necessary to the validity of the assessment to set forth correctly or at all the particular nature of the right, interest, or other matter so assessed."

By repeating the requirement of an entry when the land is unpatented, section 31 emphasises the imperative nature of that provision.

The latter part of section 31 refers to a right, interest, estate, business or occupation as mentioned in section 7. See 60 Vic., c. 21, s. 15. Omission to state the nature of the interest held in Crown land is excused but not the fact that the lands are unpatented.

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ROBSON, J.

Section 18 requires the assessor to make search of certain records to enable him to assess lands liable thereto. This would not be an exhaustive definition of an assessor's duty under section 13. The assessor is to obtain the information specified not only for the assessment but evidently for the guidance of the officers engaged in the subsequent steps. For instance, a treasurer proceeding to sell for arrears of taxes would, in preparing his list under section 162, act on the assessor's return as to whether land was patented or not.

The necessity of showing in the advertisement that the land is unpatented, if the fact is so, is shown by the judgment in *Haisley* v. *Somers*, at 603. This is an additional reason for holding that the opening provision of section 31 is imperative.

I would hold that, if in fact the land was "unpatented" within the meaning of the Act, it was imperative that the assessment roll should so state and that without an entry therein to that effect the proceedings towards taxation were deficient.

So the question is: Was the land "unpatented"?

There is no evidence of the steps by which the title passed from the Crown (Dominion) through the Railway Company to the Crown (Provincial). Doubtless there was a grant by the Dominion which was by patent or equivalent proceeding. In that sense it might be said that the land had been patented. But I think that the expression "unpatented lands" in section 31 and elsewhere in the Assessment Act has a special meaning with regard to the subject matter. That meaning may be extracted from certain provisions of the Assessment Act. The Provincial Lands Act is also illustrative.

As above stated in advertising lands for sale for taxes the treasurer distinguishes unpatented lands from those patented. This, as stated in *Haisley* v. *Somers*, is so that purchasers may know what they are getting. Ap-

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parently sales for taxes of assessable lands carry an estate in fee simple in every case where an estate in fee simple has been granted by the Crown. Where the Crown owns the land a tax sale is operative only to the limited extent mentioned in the two statutes referred to. I think it thus clearly indicated that "unpatented lands" are those which are in the Crown and regarding which the purchaser takes merely such interest as the Crown or its officers may, in the particular case, be willing to recogniso.

A key to the meaning of "unpatented lands" in the Assessment Act, where Provincial lands are involved, may be derived from certain provisions of the two Acts.

To call the land in this case "patented" might lead possibly to a tax sale purporting to be of an estate in fee simple whereas in fact all that could be so reached would be the purchaser's right under his agreement with the Crown.

A summary County Court method of collecting taxes on "unpatented land" was provided by section 146. Clause (*h*) as amended, 1906, c. 52, s. 4, made *prima facie* evidence the certificate of the Provincial Lands Commissioner or Deputy that land was unpatented or patented. No such certificate is being resorted to here, but light is thrown by this provision on the legislative intention; for, in the Provincial Lands Act, by which the Commissioner would be governed, provision is made for patent to complete sale by the Crown. See section 15. I take it that lands being administered under that Act would, before patent issued thereunder, be deemed, as far as that Act would extend, unpatented. The Provincial officers, in giving certificate under section 146, would no doubt be so guided.

In my opinion the lands in question were "unpatented lands" within the imperative direction of section 31 and

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the assessment was void for not containing an entry to that effect.

I have noticed section 5 of cap. 36, 9 Edward VII, by which all assessments made in rural municipalities for the years 1908 and 1909, based upon the previous year's assessment rolls thereof, are legalised and controlled. That would in this case ratify the adoption by plaintiff municipality for 1908 of the assessments of 1907, as was done. No argument was based on this, obviously because the validating provision merely removes any question as to the adoption of the roll for the previous year. It does not legalise an attempted assessment of such previous year not made in accordance with the law. Several instances of such legislation and the principle applicable will be found in *Endlich on Statutes* at paragraph 385.

Other questions were raised which it is not necessary to consider.

The action is dismissed with costs.

Plaintiff appealed.

F. M. Burbidge for plaintiff, appellant, cited *Reg. ex rel. Hamilton* v. *Piper*, 8 P.R. 225; *Berlin* v. *Grange*, 1 E. & A. 279, 285; *Scragg* v. *City of London*, 26 U.C.R. 263; *McCarrall* v. *Watkins*, 19 U.C.R. 248; *South Norfolk* v. *Warren*, 8 M.R. 481; *McSorley* v. *St. John*, 6 S.C.R. 531, and *City of Toronto* v. *Caston*, 30 S.C.R. 390.

J. E. O'Connor, K.C., for defendant, respondent.

THE COURT dismissed the appeal with costs without calling upon respondent's counsel.

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IN THE COURT OF APPEAL.

GREEN V. STANDARD TRUSTS CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Life insurance—Policy made payable to wife of testator—Deduction by company of amounts of loans and promissory notes made by deceased—Life Insurance Act, R. S. M., 1902, c. 83, *ss.* 7 *and* 15—*Appropriation in favor of wife of policy made payable to insured or his estate—Will.*

1. If a policy of insurance on a man's life is made payable to his wife, any loans effected upon it for the benefit of the husband, though secured by assignments executed by both and by the covenant of both to repay them, are debts of the husband's estate; and, if the insurance company after the death of the insured, upon paying the amount of the policy to the widow, deducts the amounts of the loans, she will be entitled to have the moneys made good to her out of the general estate of the deceased; and the same will be the case in respect to any unpaid premiums on the policy for which the deceased had given his promissory notes, but not to any other unpaid premiums deducted by the company in pursuance of the terms of the policy.

2. A declaration of the insured, in respect of a policy of insurance on his life in favor of his personal representatives, that, if the same be subsisting at his death and not sold, surrendered, assigned or otherwise disposed of, then upon his death it shall be for the benefit of his wife, if she survives him, is not, under section 7 of "The Life Insurance Act," R. S. M., 1902, c. 83, an effectual appropriation of the benefit of the policy to the wife. To be effective such a declaration must create an immediate trust in favor of the wife.
CAMERON, J. A., dissenting,

3. Such a declaration so worded as to take effect only on the death of the insured is a testamentary document and therefore invalid unless executed and attested as a will. CAMERON, J. A., dissenting,

Habergham v. *Vincent*, (1793) 2 Ves. 204, and *Foundling Hospital* v. *Crane*, [1911] 2 K. B. 367, followed.

The deceased by his will gave all his property real and personal "including all my life insurance" to the defendants as trustees upon certain trusts and also said "Any of my life insurance which is made payable to my wife specifically shall be her own estate, moneys and property and are not intended to be affected by the terms of this will." He had previously executed, in respect of two of his policies not made payable to his wife, declarations as outlined in paragraph 2 above.

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1912 *Held*, CAMERON, J. A., dissenting, that those two policies remained part of his general estate, and that the defendants, who had received and paid over the insurance moneys to the widow, were entitled to recover the moneys from her on their counterclaim.

DECIDED: 4th March, 1912.

Statement THE plaintiff brought this action against the executors of her late husband's estate to recover certain loans and premiums deducted by insurance companies from insurance payable on the life of her late husband. Some of this insurance was, on the face of the policies, payable to the wife. Some of the policies were made payable to W. T. Peace, the business partner of the assured during the existence of the partnership and thereafter to the executors, administrators or assigns of the assured.

The following judgment at the trial was delivered by METCALFE, J. Prior to the death of the plaintiff's husband the partnership between him and Peace had ceased to exist, and these policies had been by Peace relinquished and assigned to the deceased. On the 29th day of May, 1909, the deceased, being then ill, executed certain documents, identical in terms, dealing with each of these Peace policies, one of which is as follows:

"Statutory Declaration under the Ontario Insurance Act, R.S.O. 1897, c. 203.

I, Robert James Walker, the assured named and described in Policy No. 65718, issued by The Mutual Life Assurance Company of Canada, do hereby, in pursuance of the statute in that behalf, declare that the said policy and the assurance thereby effected shall continue to be for the benefit of myself, my executors, administrators or assigns, and subject to my disposal as I may see fit during my lifetime, but, if the same be subsisting at my death and not sold, surrendered, assigned or otherwise disposed of, then upon my death it shall be for the benefit of my wife (Clara Celestia Walker) if she survive me.

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Dated at Winnipeg this 29th day of May, A.D., 1909.
Witness: H. J. Duncan.

(Sgd.) Robert James Walker.

N.B.—This form may be used only where there is no money consideration. Where there is money consideration, or where the policy is to be pledged as collateral, the ordinary assignment form should be used."

A few days later, on the first day of June, 1909, Mr. Walker made his will, the material parts of which are as follows:

1. I hereby revoke all former and other testamentary dispositions and declare this to be my last will and testament.

2. I appoint my wife, Clara Celestia Walker, and The Standard Trusts Company to be the trustees of this my will.

3. I give, devise and bequeath unto my said trustees all my real and personal estate of every nature and kind, including all my life insurance unto my said trustees, upon trust to convert the same into money as soon as the same can be done to the advantage of my estate and, out of the proceeds,

1st. To pay all my just debts and funeral and testamentary expenses.

2nd. To pay to my mother $500.

3rd. To pay to my niece, Edna Walker, daughter of John A. Walker, the sum of $500.

4th. To invest all the rest and residue of my estate and moneys upon such investments as are authorized by statute for the investment of trust estates and to pay the entire revenue and income arising from such investments to my wife during her lifetime and upon her decease to distribute the whole of my estate in equal shares between my two brothers Joseph and Samuel and my two sisters Mary Elizabeth McDougall and Ellen McDougall, share

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and share alike, the heirs of any of my said brothers and sisters in case any of them should pre-decease me to take the share of such deceased brother or sister.

5th. Any of my life insurance which is made payable to my wife specifically shall be her own estate, moneys and property and are not intended to be affected by the terms of this will."

Shortly afterwards Walker died and The Standard Trusts Company collected the insurance less the aforesaid deductions and paid all moneys so collected over to Mrs. Walker.

Mrs. Walker has re-married and now brings the action contending that the policies are her separate property and that all moneys so owing should be paid out of the general estate and not charged against the policies. I do not think the plaintiff can succeed on this ground. It is true authority has been cited under the Ontario Act, but I think the Manitoba law governs.

Where there has been no valuable consideration for the insurance, I do not think that under our law a wife has any such vested interest in the policy as she obtains under the Ontario statute, and I think it is upon the ground of vested interest in the policy that the Ontario rule is established.

The defendant counterclaims for the moneys paid under the Peace policies. Only a few days before his death, Mr. Walker had considered the matter of his estate and insurance sufficiently to execute the said documents. It was then clear in his mind that those policies were not specifically payable to his wife. A few days afterwards he made his will, giving all his life insurance to his trustees, but stating that such as was payable to his wife specifically shall be her separate estate. The plaintiff contends that at the time of the will all the policies in question were made specifically payable to her. If there were other insurance I might be able to

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give that construction to the will, but the policies referred to in this action appeared to be all the insurance that was in effect at the time of Walker's death, and to give to the will the effect urged by the plaintiff would make one portion entirely inconsistent with the other. I therefore think that Walker did not intend, when he executed the will, that the Peace policies should be the separate estate of his wife, and that he did intend to affect such policies by his will.

The plaintiff's action will be dismissed and there will be judgment for the defendant on the counterclaim.

The defendants will have costs out of the estate. There will be no costs to the plaintiff.

Plaintiff appealed.

W. F. Hull and *J. K. Sparling* for plaintiff, appellant cited *Re Tatham*, 2 O.L.R. 343; *Re McGarry*, 18 O.L.R. 528; *Hall* v. *Hall*, [1911] 1 Ch. 487; *In re Brace*, [1891] 2 Ch. 671; *In re Cochrane*, 16 O.L.R. 328; and *National Trust Company* v. *Hughes*, 14 M.R. 41.

W. R. Mulock, K.C., and *J. W. E. Armstrong* for defendants, respondents cited *Foundling Hospital* v. *Crane*, 80 L.J.K.B. 853.

HOWELL, C.J.M. The deceased, Robert J. Walker, in 1889, at Brampton, in Ontario, while domiciled there, entered into a contract of insurance with the British Empire Insurance Co. whereby, in consideration of certain annual payments, his life was insured to the extent of $3,000, and by the terms of the policy the plaintiff, the wife of the deceased, became and was the beneficiary under the policy and entitled to the sum insured upon the death of the deceased.

In April, 1907, the deceased, together with the plaintiff, his wife, executed an assignment of that policy to Arthur & Co., to secure payment of a debt which the deceased then owed to those parties, and the plaintiff,

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his wife, joined with him in executing this assignment. The debt to secure which this assignment was given was clearly a debt owing by the deceased to the assignees of the policy, and it was executed in Manitoba while the deceased was domiciled here.

In the year 1893, while the deceased was domiciled in Ontario, he insured his life for the sum of $5,000 with the Ontario Mutual Life Assurance Company, which Company at that time had its head office within that Province, and by the terms of the policy of insurance issued by that Company the plaintiff became and was the payee and beneficiary in that policy and entitled to receive the money on the death of the deceased.

In the year 1901, while the deceased was still domiciled in Ontario, he applied to the last mentioned insurance company for a loan from the company of $500, and offered as security the last mentioned policy of insurance. For the purpose of carrying this matter through a document was drawn up and signed by the plaintiff and the deceased, and the document really amounts to an acknowledgment that the plaintiff received this money and created a lien and charge on the policy, and the husband, by the terms of the document, joins and consents to the effecting of the loan and both husband and wife covenant to pay the debt, and the document further declares that, if, before the loan is repaid, the policy becomes a claim, the Company is authorized to retain the amount of this loan and interest out of the sum insured. It appears that the loan was purely and simply a loan made to the husband at his request, but the charge was apparently taken in that form because the wife was the beneficiary and the payee. It seems to be clear that the debt was really a debt due by the husband and the proceeds of the loan were received by him.

Section 7 of c. 83, R.S.M. 1902, and section 159 of

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c. 203, R.S.O. 1897, are alike in making a peculiar provision where a policy of insurance is assigned to, or made payable to, the wife or children of the insured. It is really a statutory method of settling property upon them beyond the reach of creditors or executors. These sections alike declare that in such a case a trust is created between the insured and the beneficiary in favor of the latter. By these policies, therefore, the plaintiff became the owner of the fund represented by such policies. At the request of the deceased, however, she united with him in mortgaging or charging this property to secure advances to him for the repayment of each of which he became personally liable, and each was a debt of his which he should repay.

When the deceased executed, with his wife, the transfer or mortgage of the first mentioned policy, he was domiciled in Manitoba where he remained until his death, but apparently he was domiciled in Ontario when he united with his wife to execute the charge on the second mentioned policy. According to the law of Ontario, once having made the policy payable to his wife, the deceased had no power to convert it into a policy payable to his executors; but the law is different in this province, and let us assume that the law of Manitoba applies to both of these cases. As soon as these policies were issued and made payable to the plaintiff, as between her and the insured, she was the beneficiary and the moneys were her own property and estate and the husband was a mere trustee for her, and upon his death she was entitled to receive this money.

Section 15 of our statute, however, provides a method by which the husband can deprive his wife of the rights above set forth. It declares that he can, by an instrument in writing, absolutely revoke the benefit previously made and may re-apportion or alter or revoke the benefits "or divert the insurance money wholly or in part to

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himself or his estate." By virtue of the statutes above referred to and by the policies of insurance being made payable to her, the plaintiff was given peculiar statutory rights, intended no doubt for her special benefit, and it would seem just to require clear and conclusive language that the deceased intended to invoke the powers given him under section 15 of our statute. If these loans had been paid off in his lifetime no one would doubt that the original rights secured to the plaintiff would have been restored to her, notwithstanding those documents executed by her.

I do not find in either of the documents referred to that the deceased did by instrument intend to divert the insurance money or any part of it to himself or to his estate, and I do not think that either of these documents has deprived or was intended to deprive her of the insurance money secured by these policies.

One of the premiums of insurance of the second mentioned policy matured some months prior to the death of the insured and, in order to continue the policy, the deceased gave his promissory note for this premium and the Company accepted the note as payment of the premium. This note matured shortly after the death of the deceased and, pursuant to one of the conditions in the policy, the Company retained enough out of the policy to satisfy this note, thus reducing the amount payable to the plaintiff also by the amount of this note.

The plaintiff's position is that parts of the funds payable to her under these policies have been diverted to pay the debts of the deceased; because the deceased had not paid his debts her property had been charged with the payment of them. She has received from the companies the amount due on the policies less the two sums for which the policies were charged as above mentioned, and less the promissory note for the premium,

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and I think the estate should make good to her the sums so retained from her.

If the will of the deceased can in any way modify the effect of these written documents, it seems to me it fortifies the plaintiff's position. The fifth clause is "Any of my life insurance which is made payable to my wife specifically, shall be her own estate moneys and property and are not intended to be affected by the terms of this will."

That clause, read critically, would mean the whole of the life insurance that was made payable specifically to her, not that part of it which had not been pledged to pay his debts.

In another portion of the will there is a specific devise for the payment of all his just debts. This promissory note for the premium of insurance and these two loans above referred to are his just debts, and I see no reason why they should not have been paid by the executors, thus freeing the policies from any claim.

I see no reason for differing from the conclusion arrived at by the learned trial Judge as to the disposition of the moneys paid under the Peace policies for two reasons: 1st. The assignment under which the plaintiff asserts her claim provides that the policies shall be and remain for his (the deceased's) own benefit and subject to any disposition he may make of them during his lifetime, and if "not assigned or otherwise disposed of then upon my death * * * they * * shall be for the benefit of my wife." The will did otherwise dispose of them, and I agree with the conclusion of the trial Judge. 2nd. Upon the authority of *Foundling* v. *Crane*, [1911] 2 K.B. 367, the document above in part recited is a testamentary document and has not been executed in the form required by the Wills Act.

The appeal must be allowed in part and the judgment must be amended declaring that the plaintiff is to retain

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out of the moneys received by her from the Peace policies the three sums above referred to retained by the insurance companies out of the policies payable to her.

The plaintiff will also retain out of the above mentioned moneys her costs of this appeal.

RICHARDS, J. A. The plaintiff is the widow of Robert James Walker. In his lifetime he effected five insurance policies upon his life. Of these, three were made directly payable to his wife. The other two were made payable to a Mr. Peace, with whom he apparently had business relations. Mr. Peace subsequently assigned the benefit of those two policies to Walker. At the time of Walker's death there was no insurance on his life except that effected by the above policies.

The plaintiff and Walker borrowed money on two of the policies which were made payable to the plaintiff on their face. The loans were applied for and got for Walker's own benefit and he received the moneys for his own purposes. At the time of his death these loans had not been repaid.

A few days before his death Walker executed, as to each of the policies which had been assigned to him by Mr. Peace, a document of one of which the following is a copy:

"I, Robert James Walker, the assured named and described in Policy No. 65718 issued by The Mutual Life Assurance Company of Canada, do hereby, in pursuance of the statute in that behalf, declare that the said policy and the assurance thereby effected shall continue to be for the benefit of myself, my executors, administrators or assigns and subject to my disposal as I may see fit during my lifetime, but, if the same be subsisting at my death and not sold, surrendered, assigned, or otherwise disposed of, then upon my death it shall be for the benefit of my wife, Clara Celestia Walker, if she survive me."

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In the other the number was 65719, but it was otherwise the same as the above.

Thereafter he made his will, by which he purported to give to his trustees, upon certain trusts, all his estate of every kind, "including all my life insurance." The same will contained the following clause: "Any of my life insurance which is made payable to my wife specifically shall be her own estate, moneys and property and are not intended to be affected by the terms of this my will."

As to certain of these policies Walker, before his death, had given promissory notes for premiums; and certain other premiums for which he had not given promissory notes, but which the companies had the right to deduct from the face of the policies, also come in question.

After Walker's death his widow received the proceeds of both of the policies which had been made payable on their face to Peace, the Company, however, deducting in respect of such policies the amounts of the promissory notes given by Walker for premiums and the amount of such other premiums as they were entitled as above mentioned to deduct. She also received, in the same way, the amount of the policy made payable on its face to her, but on which no sum had been borrowed.

As to the two policies on which loans had been made, she received the amounts payable, less the amount of the loans and premiums for which notes had been given and the other premiums as above mentioned.

The plaintiff brought this action against Walker's executors, to compel them to pay to her the amount which had been deducted to pay the loans on the two policies upon which loans had been made. The executors disputed her right to this relief and counterclaimed, asking that she be compelled to pay to them the amount received by her on the two policies which had originally been made payable to Peace.

The trial Judge, Mr. Justice Metcalfe, held that she

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was not entitled to be re-imbursed out of Walker's estate, the amount deducted for loans, and held also that she was compellable to pay to the estate the amount received by her on the Peace policies. From that decision the plaintiff appealed.

The parties resided in Manitoba when the loans were made, and I think the law of Manitoba is applicable.

Sections 7 and 15 of the Life Insurance Act, R.S.M. 1902, c. 83, eliminating such portions as are not material to this case, are as follows:

7. "In case a policy of insurance heretofore or hereafter effected by a married man on his life is expressed upon the face of it to be for the benefit of his wife * * * or in case he * * * by any writing identifying the policy * * * has made * * * a declaration that the policy is for the benefit of his wife * * * * such policy shall inure, and be deemed a trust, for the benefit of his wife for her separate use * * * and, so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy shall become payable.

15. "If, in case of a policy of insurance heretofore or hereafter effected by a man * * * it is expressed on the face to be for the benefit of, or has been * * * under this Act appropriated for the benefit of, his wife * * * then the insured may, by an instrument in writing, * * * absolutely revoke the benefit or declaration or appropriation previously made * * * and divert the insurance money * * * to himself or his estate * * * *."

Under the wording of section 7 it seems to me that, although Walker was in no way bound to keep alive the policies payable on their face to his wife, yet, so long as he did so, such policies were, as against both him and the

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company, a trust for the benefit of his wife for her separate use, unless he executed a revocation and appropriation under section 15, which he did not do. The position, then, is this, with regard to the policies on which the loans were made, that they were the wife's separate property, and moneys were borrowed upon them for Walker's benefit. I think there is no doubt that, under those circumstances, his estate was liable to repay her the moneys retained to pay these loans, just as he would be responsible to repay her directly a loan made out of her separate estate to him.

As to the Peace policies, however, I think the learned trial Judge was right in holding that the plaintiff was not entitled. If they became her property at all, they became so either by virtue of the above recited declaration of 29th May, 1909, or by virtue of the will.

Dealing first with the will. If the Peace policies were his, I do not think the will passed them to the widow. He distinctly bequeaths all his life insurance to his trustees. By that he must be held to have meant such as he had control over. The provision in the fifth clause, above quoted, by which he says his will is not to affect insurance payable to his wife specifically, seems to me only to refer to policies payable to her on their face, and his object, probably, was to prevent his will from operating, with regard to these last named policies, as a revocation, or appropriation, under section 15. By the word "specifically" I think he means "on their face," or "as originally made."

It was urged that in bequeathing his life insurance to the trustees he may have supposed that he had other policies than the five which he had. I can see nothing in that contention.

It is argued, however, that the declaration of the 19th May is an appointment of the Peace policies in his wife's favor. The first part of that declaration simply provides,

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in effect, that they shall be his own during his lifetime; and they would be that without any such declaration; so that, in so far as that goes, the declaration amounts to nothing and does not affect the policies in any way. The part that the plaintiff has to rely on must be the last clause: "But, if the same be subsisting at my death and not sold, surrendered or otherwise disposed of, then upon my death it shall be for the benefit of my wife." Except as to that last clause, nothing is attempted to be effected by the declaration.

In the case of *Foundling Hospital* v. *Crane,* [1911] 2 K.B. 367, it is held that a document executed and delivered by a person, to take effect only at the time of his death, is a testamentary document, and is invalid unless executed according to the provisions of the law with regard to the execution of wills. This is also held in *Habergham* v. *Vincent,* 2 Ves. 204, and in *The Goods of Morgan,* L.R. 1 P. & D. 214.

I incline to the belief, therefore, that, as this declaration was not to come into force until the time of Walker's death, and was not executed as the law requires with regard to testamentary documents, it was of no effect.

But, if it should be that the provisions of the Life Insurance Act, as to appropriations of policies, extend far enough to make valid an appropriation of this kind, though not made by will—and I cannot, on reading the provisions of the Act, see that they do—yet there is a further matter, which I think is fatal to the plaintiff's claim. This proviso in the declaration means that, if at the time of his death the policies are not disposed of, then they are to be for the benefit of the wife. Section 22 of the Manitoba Wills Act says that every will shall be construed to speak, and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will. No such contrary intention is shown in Walker's will and,

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therefore, under the provisions of section 22, the will, speaking immediately before Walker's death, disposed of these Peace policies, and they, therefore, had at the actual time of his death been disposed of, so that the condition on which the plaintiff should take them under the declaration had failed, as a result of this disposal.

I think the plaintiff is entitled to be repaid, from the general estate, the amounts deducted from two of the policies payable to her in respect of loans made upon them and also to be repaid in respect of such policies, and of the other policy made payable on its face to her, any sums deducted for promissory notes given for premiums by Walker. As against that I think she must repay to the general estate the amounts received by her upon the Peace policies. He was not bound to pay the premiums for which he had not given his notes. They were, therefore, not his debts and his estate can not be held liable for them.

PERDUE, J.A. The plaintiff was the wife of the testator Robert James Walker, After his death she married one Green. Walker, who was a resident of Winnipeg, had five policies of life insurance in force when he died. Three of these were upon their face made payable to his wife, the plaintiff. The other two policies, being for $5,000 each, were made payable by their terms to "W. T. Peace, the business partner of the assured during the existence of the co-partnership; thereafter to the executors, administrators or assigns of the assured." Peace had released all his claims under these policies to Walker, so that the same became payable to the personal representatives of the latter, subject to any disposition he might make of them during his life.

On 29th May, 1909, Walker executed two documents in identical terms referring to the Peace policies. One of these documents, sufficiently showing the contents of both, is set out in the judgment appealed from.

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The testator during his lifetime had, with the concurrence of his wife, effected loans upon two of the policies payable to her. These loans were, after the testator's death, paid out of the moneys receivable under the policies. Several promissory notes given by him for premiums and also several half yearly deferred payments for premiums were deducted by the insurance company from the amounts payable under the policies issued by the Company. The plaintiff claims that the amount of the loans and of the premiums so deducted should be paid to her out of the general estate of the deceased.

The defendants, The Standard Trusts Company, and the wife of the deceased are the executors under the will of the testator. The Trusts Company collected the insurance moneys payable under the five policies less the above deductions and paid the whole amount to the plaintiff.

The testator by his will, the material parts of which are set out in the judgment of Metcalfe, J., devised all his estate including all his life insurance to his aforesaid trustees upon trust; (1) to pay debts, (2) to pay certain legacies mentioned, (3) to invest the residue and pay the income of his wife during her life and, upon her decease, to distribute the fund between his brothers and sisters named in the will. Then follows a declaration in the following words: "Any of my life insurance which is made payable to my wife specifically shall be her own estate, moneys and property and are not intended to be affected by the terms of this will."

The defendants counterclaim for the amount of the two policies of life insurance which had been made payable to Peace.

It is claimed by the plaintiff that the documents of 29th May were sufficient declarations under the statute and that their effect was to confer upon her the benefit of the policies. There was some discussion as to whether

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the Ontario or the Manitoba law applied to the two policies in question, both having been issued by a company having its head office in Ontario and the insurance money being payable under each policy at the company's head office. I do not think it is necessary to consider whether the law of Ontario or the law of Manitoba should be applied in regard to the questions that arise in this case. The Peace policies were not by their terms payable to the wife of the assured and the main question is, did the documents of the 29th May contain such a declaration in favor of the wife as is contemplated by our Life Insurance Act, R.S.M. 1902, c. 83, or by the Ontario Act, R.S. Ont. 1897, c. 203, ss. 159-160? I am unable to find any substantial difference between the provisions of the Manitoba Act and those of the Ontario Act, in so far as this question is affected.

By section 7 of the Manitoba Act (corresponding in effect with section 159, clause 1, of the Ontario Act), where a policy of life insurance is expressed on its face to be for the benefit of his wife, "or in case he has heretofore indorsed * * or by any writing identifying the policy by its number or otherwise or by his will, has made * * a declaration that the policy is for the benefit of his wife * * , such policy shall inure and be deemed a trust for the benefit of his wife for her separate use."

In order to create the trust in favor of the wife under the foregoing provision, where the policy is not on its face payable to her, there must be an instrument in writing signed by the husband declaring the insurance to be for her benefit. The words used in the writing must, at all events, be as full and as operative as would be necessary in order to create an immediate declaration of trust. "They must be clear, unequivocal and irrevocable * * words that show that the donor means, at the time he speaks, to divest himself of all beneficial interest in

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the property." *Grant* v. *Grant*, 34 Beav. 623. The declaration under the Act should be positive and unconditional and should take effect at once.

The instruments of the 29th May declare that the policies and insurance shall continue to be for the benefit of the assured, his executors, administrators or assigns, and subject to his disposal as he may see fit during his lifetime. It is only at his death and if the insurance is then subsisting and not sold, surrendered, assigned or otherwise disposed of, that it shall be for his wife's benefit, if she survives her husband. This is not a positive, unconditional declaration that the insurance is for the benefit of the wife. There is no intention that it shall take immediate effect; on the contrary, any effect it can possibly have is postponed until after the death of the husband. It is conditional, qualified and uncertain. It does not confer upon the wife any actual benefit or interest in the insurance moneys during the lifetime of her husband. It retains the insurance under the control of the husband, although the purpose of the Act was to enable him to create a trust in favor of his wife and children or his wife alone, which would, while it existed, remove the insurance from his control and from the control of his creditors.

The instruments of the 29th May are also open to another objection which appears to me to be fatal to their validity. By their terms the husband retains the property in, and benefit of, the insurance and complete power of disposal over it during his life, but declares that upon his death it shall be for the benefit of his wife if she survives him. The instrument does not operate in favor of the wife until after his death. This is clearly a testamentary document and, not being executed in the manner prescribed by the Wills Act, it is inoperative. In *Habergham* v. *Vincent*, 2 Ves. 204, 231, Buller, J., stated it to be established law that "an instrument in any form,

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whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a grant: but, as upon the whole the intention was that it should have a future operation after death, it was considered as a will." The same principle was adopted *In the Goods of Morgan,* L.R. 1 P. & D. 214, and in the very late case of *Foundling Hospital* v. *Crane,* [1911] 2 K.B. 367.

I am, therefore, of opinion that the instruments of the 29th May did not confer the benefit of the insurance upon the plaintiff.

The last paragraph of the will clearly excepts from the operation of the prior parts of the will the policies made payable to the plaintiff specifically. The other two policies, those payable to Peace in the first instance, form part of the general estate and are subject to the trusts declared in the will.

The loans effected by the testator upon two of the policies payable to his wife were made for his benefit. Although the plaintiff joined with him in pledging the policies as security for the loans and signed promissory notes jointly with her husband for the amounts borrowed, all the proceeds of the loans were paid to the husband and she received no part of them. These loans should be paid out of the testator's estate not specifically devised: *Re Tatham,* 2 O.L.R. 343; *Re McGarry,* 18 O.L.R. 524, 528; *Hall* v. *Hall,* [1911] 1 Ch. 487.

At the death of the testator there were three promissory notes unpaid which had been given by him for premiums due to the insurance company. The amounts of these notes were deducted by the company from the insurance money when making settlement. These were also debts of the testator and payable out of his

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estate other than the policies specifically payable to the plaintiff.

There were also deducted by the company from the insurance money three deferred half-yearly payments upon premiums. These half yearly payments fell due after the death of the testator. By the contract of insurance the balance of the whole year's premium was to be deducted from the insurance on making settlement of the claim. These deferred payments were not debts of the testator. He was not bound to keep up the insurance. Making payment of the premiums was a voluntary act upon his part in so far as the devisees are concerned. I think the deferred premium upon each policy should be deducted from the amount of the policy.

The judgment of Metcalfe, J., should be varied in accordance with the foregoing. The Registrar of the Court should, if necessary, ascertain the amount to be repaid by the plaintiff to the defendants in respect of the Peace policies and this amount she should be ordered to pay to the defendants.

CAMERON, J.A. In the case of the insurance policy with the British Empire Mutual Life Assurance Company, the loan thereon was secured by the promissory note of the insured and his wife, the present plaintiff, and by an assignment of the policy. In the case of one of the policies with the Mutual Life Assurance Company of Canada, the loan was secured by an assignment of the policy to the Company, containing the joint and several covenants of the insured and his wife for repayment. The proceeds of these loans went to the insured. Both policies were made payable to the plaintiff. The amounts of the loans were deducted from these policies, when payment was made, after the death of the testator, and as to them the question is whether these deductions are properly payable out of the proceeds of the policies or

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out of the testator's estate in the hands of the executor and executrix.

These policies are payable on the face of them to the wife and, therefore, are not affected by the will. The will directs the trustees to convert all the testator's real and personal estate and out of the proceeds "to pay all my just debts." Thus the testator charged all his estate with his debts and "the Courts have construed the expression 'debts' with considerable latitude. "Under a charge of 'debts' in a will are included all liabilities to which the personal estate is liable: as damages for breach of a covenant occurring after the testator's death": *Jarman on Wills,* 1989, note.

By section 7 of The Life Insurance Act, R.S.M. 1902, c. 83, a policy of insurance effected by a married man for the benefit of his wife creates a trust in her favor, and the moneys payable thereunder do not, so long as any object of the trust remains unperformed, form part of the estate of the insured or become subject to his debts. By section 22, the insurance money is to be free from the debts of the insured and is to be paid according to the terms of the policy. Here the insured procured advances from the insurance companies for his own benefit and gave his promissory note in the one case and his covenant in the other to repay the amounts of the several loans. Had he lived and repaid the loans no question would have arisen. Because of his death before this was done, is the value of her interest in the policies to be impaired? The object of the statute was to secure to the wife the payment of the policy free from any claims by executors or creditors. I cannot read the assignments as revocations *pro tanto* under section 15 of the Act. It was clearly never the intention of the testator that they should operate as such or they would have complied more plainly with the strict wording of that section. The testator was in the position of borrowing money upon the security of

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policies in which by the statute his wife had the beneficial ownership. It was open to him absolutely to revoke that ownership, but he did not choose to do so. The wife was in the position of lending the husband her property and her name as security for his debt. Under the circumstances, it seems to me that the amounts deducted from the policies must be paid out of the testator's estate and that the plaintiff must succeed on this branch of the case.

As to the counterclaim, that depends altogether upon the construction to be given to the wording of the declarations and the will. The declarations are dated May 29, the will was made June 1, and the testator died June 9, in the year 1909. There can be no doubt that, under the appropriations of May 29, the policies affected thereby were made payable on the testator's death to the plaintiff specifically as she is referred to therein as his wife, and by name also. Had these two been the only policies payable to her, and had the three other policies been payable to the testator's estate, or had the husband died intestate, I think the amounts payable under these two policies would have been paid over to the widow without question. It is argued, however, that there were but five policies in all, three of them payable to the plaintiff on their face, and that, therefore, to make the words in sub-clause 5 of clause 3 of the will cover all the policies would be inconsistent with the previous part of clause 3, by which the testator devises all his real and personal estate, "including all my life insurance." Nevertheless, it is clear that if there be any inconsistency in different parts of the will, the later part must govern. This is the rule, and the effect of it, under the circumstances of this case, is practically to reject the words "including all my life insurance" as superfluous, or as referring to insurance the testator thought, mistakenly, he had previously effected or insurance that he might effect after making

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his will. I fail to see how any distinction can be drawn between the policies payable specifically to the wife on their face and those payable specifically to the wife by a subsequent document. In fact they are all of them payable to the wife and to no other person and therefore payable to her specifically.

In construing the language of the declarations or appropriations, it appears to me that, though expressed to be pursuant to the Ontario Act, they are sufficient and effective under our own statute, which must govern. The benefit of these policies is conferred upon the wife, but that benefit is to come into being only upon the death of the testator, and if the policies are then subsisting and "not sold, surrendered, assigned or otherwise disposed of."

It is argued that these appropriations are not in accordance with the statute, that they are for the benefit of the insured, his executors, administrators or assigns and subject to his disposal in his lifetime and for the benefit of the wife only upon the death of the insured, if the policies are then subsisting, and that they are, therefore, ineffective and invalid. And yet, if these declarations had been in these words: "I declare that policy No..... in the Ontario Mutual Life Assurance Co. is for the benefit of my wife under the provisions of chapter 83, R.S.M. 1902," what would have been the result? It is clear that the insured could still, under section 15, absolutely revoke the benefit, alter or revoke it, or divert the insurance moneys wholly, or in part, to himself or his estate. So that the insured could do by law all that he is expressly empowered to do by the words of the appropriations. All of which goes to show that the appropriations are in accordance with the statute and therefore effective.

As the statute authorizes the insured to appropriate the whole policy for the benefit of the persons therein named,

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it must follow that he can appropriate a part of the policy and that he can, instead of making a gift absolute, make a gift conditional or contingent. In any event, here, where the benefit is contingent upon his death and upon the policy being then subsisting and not previously thereto sold or otherwise disposed of, the benefit of the policy is conferred upon the wife on such terms as the statute contemplates.

It was further argued that the appropriations, being in fact gifts to take effect upon the death of the donor, are testamentary instruments and that, as they do not conform with the provisions of the Wills Act as to formalities of attestation, they are void. On this point we were referred to *Foundling Hospital* v. *Crane,* 80 L.J.K.B. 853, and the cases therein quoted. In principle it is difficult to distinguish those cases from this one now before us. But any appropriation for the benefit of a wife or children under the Act is open to the same objection. These appropriations are, in my opinion, in accordance with and authorized by the statute. They have the characteristics of testamentary instruments as have all other similar documents under the Act, but the Legislature, fully aware of this, gave such documents the powers and qualities set forth in sections 7, 8, 15, 28, 29 and other sections of the Act. They are special statutory instruments and are wholly without the provisions of the Wills Act.

I do not consider that the testator, when he uses the words in his will: "I give, devise and bequeath unto my said trustees all my real and personal estate of every nature and kind, including all my life insurance," thereby revoked the appropriations previously made. Had it been the wish of the testator by his will to revoke the benefits already declared or otherwise deal with them in accordance with the provisions of section 15 of the Act, it seems to me that he would have expressed his intention

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in language more definite and appropriate, and more in conformity with that employed in that section.

In any event, (and this is the view that appeals to me most strongly) the policies in question, being made payable by the appropriations to the wife specifically, and thus expressly excluded from the operation of the will, are unaffected, and cannot be held to be disposed of, by it.

In my judgment, therefore, the policies covered by the declarations are payable to the plaintiff and not to the executor and executrix.

MESSERVEY V. SIMPSON.

Before ROBSON, J.

Joinder of parties—Slander—Joinder of causes of action—Striking out pleading as embarrassing—King's Bench Act, Rule 326.

A number of defendants cannot be sued together for slander without an allegation that they have conspired together to slander the plaintiff; and, where the statement of claim seeks damages against a number of persons for false imprisonment in one paragraph, and for slander in other paragraphs without any allegation of a conspiracy to defame, the latter paragraphs should be struck out as embarrassing under Rule 326 of the King's Bench Act.

Carrier v. *Garrant*, (1873) 23 U.C.C.P. 276, followed.

DECIDED: 5th March, 1912.

Statement

APPEAL from an order of the Referee striking out portions of the statement of claim.

Plaintiff brought this action against K. R. Simpson, G. H. Nelles and the Thiel Detective Service Company of Canada, as defendants.

The statement of claim alleged that plaintiff was a team driver, defendants Simpson and Nelles produce dealers in business in Winnipeg and the Thiel Detective Service Company of Canada a private detective agency; that for several months prior to the 7th December, 1911, plaintiff had been employed by Simpson and Nelles doing business as the Simpson Produce Company, as a driver and

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deliverer of goods for them; that on Monday, 18th December, 1911, defendants took plaintiff into custody, making against him a false charge of having stolen goods from Simpson and Nelles while in their service, and imprisoned plaintiff in the office of Simpson and Nelles, and, while so holding him, defendants falsely accused him of theft from Simpson and Nelles and threatened that they would lay and prefer a charge of theft against him before a magistrate.

The paragraphs of the statement of claim referred to in the judgment were as follows:—

4. The defendants at and during and near about the time last above mentioned falsely and maliciously spoke and published of the plaintiff words imputing to the plaintiff that he had been guilty of theft and so spoke and published the said words in the presence of—at the time aforesaid— one Jack O'Brien, and in the presence of one Myers; the same being so done at the office of the defendants Simpson and Nelles, and in the presence of one H. Wunderling, and of one Julius J. Brown and of other persons; saying of the plaintiff "There are two men who are in gaol and they can go in the witness stand and swear that they saw you"—meaning the plaintiff—"steal, and Alexander"— meaning another employee of the defendants Simpson and Nelles—"says he saw you steal"—meaning that the said Alexander saw the plaintiff steal the goods of the defendants Simpson and Nelles —and further "You know J. G. McKinnon, the butcher on McDermott and Isabel, and he will go on the witness stand and swear that you took ham and sold to him"—meaning thereby that the said McKinnon had made the above statement and meaning thereby to impute that the said ham had been stolen by the plaintiff from the defendants Simpson and Nelles and had been so feloniously disposed of to the said McKinnon.

5. The defendants falsely and maliciously spoke and published against the plaintiff in the presence of several of the persons in the last paragraph named, and in the presence of one Jacob Alexander words so imputing theft to the plaintiff in the following words, addressing the said Alexander in the presence of the several persons among others above named; "You know this man"—meaning thereby, You, Alexander, know this man, the plaintiff— and the said Alexander then answering thereto "Yes;" the said defendants proceeded to say "Do you remember what you told about him stealing?"—meaning thereby and imputing to the plaintiff that he had been guilty of stealing from the defendants Simpson and Nelles, and meaning that the said Alexander had so stated to them—each of which statements was false.

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The said statements in this paragraph set out were made in front of the office of the defendants, Simpson and Nelles.

6. Later, on the same occasion as in the last preceding paragraph mentioned, the plaintiff having been taken into the office of the defendants, Simpson and Nelles, the defendants imputed to the plaintiff and made against him a charge of theft, saying amongst other things alleged to have been stolen that the said Jack O'Brien had seen the plaintiff steal a case of eggs out of the warehouse on Saturday night—meaning out of the warehouse of the defendants, Simpson and Nelles—and further stating "It is easy to prove it against you on account of your wife," and further "Your wife has been here on several occasions and told that you have not been home for two, three and four days at a time and wanted to know where you were, and several times you have been known to be picked up on the street and put upon your rig and you and your horses have had to be put in the stable," meaning thereby to impute that the plaintiff was guilty of theft and that on account of his conduct as a husband it could be proved against the plaintiff, and on account of drunkenness while in the discharge of his duties the said crime could be further proved against the plaintiff; all of which charges and imputations were absolutely untrue.

7. At the same time and place the defendants charged the plaintiff falsely and maliciously, saying to him in the presence of the several persons above mentioned "You remember down in Murphy Bros.,"—being a restaurant carried on by persons of that name—"when you got to Murphy's you stole out of there and took away things and sold them to some place. Every time after you left their place—meaning thereby Murphy Bros.,—they always missed something," and further "Several times Alexander"— meaning the said Alexander—"was on your rig and the two of you stole together."

A. A. Smith, for plaintiff.

H. Phillipps for the Thiel Detective Service Company of Canada.

ROBSON, J. Appeal from an order of the Referee striking out portions of the statement of claim.

The action is for damages for certain alleged torts. The defendants are the two members of the partnership firm of Simpson and Nelles and The Thiel Detective Service Company, Limited.

The statement of claim alleges that for a period prior to 7th December, 1911, plaintiff had been employed by Simpson & Nelles as a driver, which employment ceased on said date.

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ROBSON, J.

The plaintiff seeks damages for false imprisonment and slander. He makes the charge against the three defendants jointly.

The matters now particularly in question are the charges contained in paragraphs 4, 5, 6 and 7 of the statement of claim wherein it is alleged that the defendants falsely and maliciously spoke and published defamatory words concerning the plaintiff, imputing theft from defendants Simpson & Nelles. This charge is made jointly against the two members of a partnership and an incorporated company. Under the old procedure this was such a misjoinder as to have defeated the action. See *Carrier* v. *Garrant*, 23 U.C.C.P. 276. See also *Odger on Libel and Slander*, 5th ed., at foot of page 601.

In brief I would say that it is my view that these clauses 4, 5, 6 and 7 are embarrassing and that any defendant is entitled to have them struck out under rule 326.

The same remark applies to the words struck out of paragraph 8.

The appeal should be dismissed with costs as in the Referee's order.

Time for amendment will be extended if desired.

ALEXANDER v. SIMPSON.

Before ROBSON, J.

Joinder of parties—Joinder of causes of action—Slander—Conspiracy to defame.

Where a number of parties are charged with having in collusion defamed the plaintiff this does not sufficiently indicate to the defendants that they are being charged as members of a conspiracy to defame the plaintiff, and a paragraph containing such charge should be struck out as embarrassing with leave to amend.

DECIDED: 5th March, 1912.

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Statement

APPEAL from an order of the Referee in Chambers striking out certain portions of the statement of claim.

The action was brought for damages for false imprisonment and slander and resembled that of *Messervey* v. *Simpson, ante,* the defendants being the same.

A. A. Smith, for plaintiff.

H. Phillipps for defendants, The Thiel Detective Service Company.

ROBSON, J. Appeal from an order of the Referee in Chambers striking out certain portions of the statement of claim.

The action is for damages for false imprisonment and slander, and resembles that of *Messervey* v. *Simpson et al,* the defendants being the same.

Paragraph 2 of the statement of claim alleges two causes of action for false imprisonment, one against the defendants Simpson & Nelles, the other against the three defendants. The learned Referee directed that these be struck out with leave to substitute allegations in separate paragraphs. While this may not have been necessary, I will not interfere with the discretion so exercised.

Paragraph 3 and the parts of paragraphs 4 and 5 struck out by the Referee were objectionable for the reason mentioned by me in the *Messervey* case, and the Referee's order thereon must stand.

The whole of paragraph 6 was struck out by the order in appeal. This paragraph alleges that the defendants Simpson & Nelles in collusion with the other defendants defamed the plaintiff. It occurred to me that this might be treated as an allegation of a conspiracy to defame within *Carrier* v. *Garrant,* 23 U.C.C.P. 276, but one charge made in the paragraph seems to be levelled at defendants Simpson & Nelles, and the other at defendant Simpson. The paragraph is ambiguous as to whether defendant the Thiel Detective Company is being sued or

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merely named as a party in collusion. The defendant Company is entitled to have that cleared up. Moreover, I do not think the mere use of the words "in collusion" sufficiently indicates to the defendants that they are being charged as members of a conspiracy to defame plaintiff, if that were really the pleader's intention. I will not interfere with the Referee's order. Amendments beyond those allowed by him may be proper and that phase may be spoken to. Costs in cause to defendant Thiel Detective Company in any event.

REX v. JOHNSTON.

Before PRENDERGAST, J.

Criminal law—Habeas Corpus—Taking depositions in shorthand—Oath of stenographer—Summary conviction.

It is essential to the validity of a summary conviction for an offence against the Criminal Code, when the evidence is taken in shorthand, that the stenographer should first be sworn to take down the depositions truly and faithfully.

The King v. *L'Heureux*, (1908) 14 Can. Cr. Cas. 100, followed.

The Habeas Corpus Act, 31 Ch. II, c. 2, applies to summary convictions.

Rex v. *McEwen*, (1908) 17 M.R. 477, distinguished on the ground that it dealt only with a conviction by a police magistrate exercising the extended jurisdiction to try indictable offences summarily.

DECIDED: 6th March, 1912.

Statement

APPLICATION upon the return of a summons for an order for the issue of writs of *habeas corpus* and *certiorari* in aid, upon which the whole matter by agreement was presented as if the writs had issued and had been returned.

The conviction against the prisoner was that she "did unlawfully, being a common prostitute or night walker, wander in the streets of the City of Winnipeg, not giving a satisfactory account of herself when called upon to do so, and is thereby a loose, idle and disorderly person and a vagrant."

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The grounds taken in the summons were:—

"1. That the information and conviction are bad in that they disclose no offence in law.

"2. That the magistrate did not, before the said stenographer took the evidence, first adminster the oath to the said stenographer that he would truly and faithfully report the evidence as required by statute.

"3. That there is no evidence to support the said conviction."

P. E. Hagel for the prisoner.

R. B. Graham, Dep. Atty. Gen., for the Crown.

PRENDERGAST, J. I dismiss the preliminary objection to the application, based on 31 Ch. II., c. 2, s. 2. *Rex* v. *McEwen,* 17 M.R. 477, deals only with convictions by a police magistrate exercising the extended jurisdiction to try indictable offences summarily, and not with summary convictions. It has been the constant practice of this Court to deal with such matters as this one on application for *habeas corpus,* as in *The King* v. *Pepper,* 15 Can. Cr. Cas. p. 314, and in *Rex* v. *Barnes,* 21 M.R. 357. See also *The King* v. *Leschiniski,* 17 Can. Cr. Cas. 199 and the comment therein on *The Queen* v. *St. Clair,* 3 Can. Cr. Cas. p. 551, as to the original jurisdiction of the Court of King's Bench in England and of this Court.

On the first ground urged for the applicant, I hold that the information and conviction disclose a criminal offence under section 238 (*i*) of the Code.

As to the second objection that the stenographer was not sworn as required by section 683, I uphold the same; and, adopting the views of Craig, J., in *The King* v. *L'Heureux,* 14 Can. Cr. Cas. 100, I hold this to be fatal. There are then no valid depositions, there is no valid evidence to support the conviction, and this of course is not a mere matter of form or procedure but one of jurisdiction.

The conviction will be quashed and the prisoner discharged from custody.

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IN THE COURT OF APPEAL.

COOPER v. ANDERSON.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Real Property Act, R.S.M. 1902, *c.* 148, *ss.* 71 *and* 91—*Purchaser for value without notice—Concealed trust—Caveat—Parties to action.*

Held, per Robson, J., in the court below:

1.. Under sections 71 and 91 of the Real Property Act, R.S.M., 1902, c. 148, a person who purchases land under an agreement of sale from the holder of a certificate of title under the Act without any notice or knowledge of any trust to which the land was subject in the hands of such holder, or of any other defect in the title, takes the land free from any such trust or defect and from all liability to any action at the suit of any person claiming an interest in the land as against the vendor and it makes no difference that he receives notice of the claim of such person before he has paid all his purchase money or received his transfer.

2.. If, therefore, in an action against the vendor charging fraud in his dealings with the land and a secret trust in the plaintiff's favor, such purchaser is made a party defendant, in respect of his agreement registered by way of caveat against the lands, he will be entitled to an order dismissing the action as against him with costs.

On the hearing of the appeal from the decision of Robson, J., above noted it was alleged that one Orpen, not a party to the action, was interested in its subject matter and the Court deemed it advisable, without deciding the questions of law involved in the judgment, to vacate it and re-instate the action as it was before it was pronounced and allow all parties to amend as they might be advised.

Costs to be costs in the cause.

DECIDED: 19th March, 1912.

Statement. APPLICATION for an order vacating the registration of a certificate of *lis pendens*.

The following judgment was delivered by

ROBSON, J. In this action plaintiff seeks to establish an interest in certain land in Winnipeg.

The defendants are John Herbert Anderson, Walter Wickson, The Trusts & Guarantee Company, Limited, Annie Anderson, Agnes Anderson and The Trust Investment Company, Limited.

The matter comes up now upon an application by The Trust Investment Company, Limited, for an order vacating the registration of a certificate of *lis pendens*.

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ROBSON, J.

It was agreed by all parties that I should consider the pleadings and make such order thereupon as might seem proper in view of the contentions of the parties now to be mentioned.

The pleadings are lengthy. I will endeavor to epitomize them.

In his statement of claim plaintiff alleges that, as security for a debt from J. H. Anderson to him, the land was transferred to plaintiff and that he, plaintiff, received a certificate of title about 30th December, 1902; that on 28th April, 1905, plaintiff granted to Anderson power of attorney; that about 13th November, 1907, a conspiracy was formed between Anderson and defendant Wickson to transfer the lands to Wickson in trust for Anderson and that a certificate of title issued to Wickson on 13th November, 1907; that on 31st January, 1910, Wickson, at the request of Anderson, in furtherance of the fraud, transferred the land to the Trusts & Guarantee Company as trustee for Anderson and that on 4th April, 1910, that Company was registered as owner in fee simple in possession, though in fact it holds the land in trust for the defendants Anderson, the defendants Annie Anderson and Agnes Anderson taking their supposed shares as gifts from J. H. Anderson; that the defendants The Trust Investment Company filed a caveat against the lands claiming to have purchased under an agreement from the Trusts & Guarantee Company. The charges of fraud are set forth very fully and with alternative aspects. The plaintiff claims that the transfer be set aside and certificate of title cancelled and a declaration that plaintiff is entitled to be registered as owner subject to any rights The Trust Investment Company may be declared by the Court to have. There are also demands for other relief not now important.

It will be observed that the Trust Investment Company is not involved in the charges made against the other

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defendants. Those defendants do not question the position of the Trust Investment Company. The only allegation by the plaintiff affecting that Company is that it filed a caveat as purchaser under an agreement from the Trusts & Guarantee Company.

The prayer asks that the certificate of title be set aside. With it the caveat would go too, so the Trust Investment Company is concerned in the relief claimed, though no facts are alleged making out a cause of action against it. The statement of claim seems to assume that, if the plaintiff's allegations as to the other defendants were made out, the Trust Investment Company's agreement would necessarily cease to affect the land. The indefinite acknowledgment in the prayer of possible rights of that Company was made, I infer from the argument, in the expectation that the Company might be allowed a lien for moneys paid by it under its agreement.

In its statement of defence, which was repeated in reply to the amended statement of claim, the Trust Investment Company says it purchased the land from the Trusts and Guarantee Company under agreement in writing, dated 27th March, 1911, for the price of $55,000 of which $18,334 was paid in cash, the balance being payable in three instalments; that, at the time of the execution of the agreement and registration of the caveat in question, the title to the land was in the Trusts & Guarantee Company as shown by a certificate of title under the Real Property Act, subject to no incumbrances save a mortgage not now in question; that the Company made all proper inquiries and was unaware of any interest save as shown by the Register.

It is alleged that notice of assignment by the Trusts & Guarantee Company to another party of the Trust Investment Company's covenants in the agreement has been received by the latter.

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ROBSON, J.

The plaintiff's reply to the original statement of defence of the Company was treated as applying to the defence to the amended statement of claim.

By that reply all the allegations of The Trust Investment Company are admitted. The words are added, "The plaintiff admits that the purchase of the said lands as aforesaid was made by the said defendant innocently and in good faith."

There is thus said to be raised on the pleadings, without any specific issue of fact concerning it, the question whether the Trust Investment Company is affected by notice, received by means of this action, of the fraud described, supposing such to have existed. It is contended by the plaintiff that the Trust Investment Company's agreement is, by notice of the plaintiff's rights before completion, subject thereto and that if plaintiff succeeds the agreement will fall with a possible right to the purchaser to a lien on the property for the $18,334 it has paid.

The Trust Investment Company in short says that it relied on the certificate of title; that it is in no way concerned with the troubles of the other parties and should not be harrassed thereby, and that it should be dismissed from this action with its agreement unimpaired.

Plaintiff's counsel contended that the contract was not completed, and cited English cases to show that notice to an intending purchaser, before completion, that equities existed in favor of third parties was sufficient to intercept the contract and prevent the intending purchaser from acquiring title. *Tourville* v. *Naish,* 3 P.W. 307, was referred to. Other cases are mentioned in the notes thereto, one being *Wigg* v. *Wigg,* 1 Atk. 382, where Lord Chancellor Hardwicke is reported to have said that, though a purchaser did not know of an incumbrance before he paid his money, yet as he knew it before the deed was executed it affected him with notice. To meet

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the idea that, by virtue of the vendor and purchaser agreement, the purchaser was to be taken to be the beneficial owner and the vendor a trustee, authorities were cited to show that such trusteeship is but a qualified one and does not affect strangers.

This argument is fraught with great possibilities. Carried to its legitimate extent, it means that even after payment of the purchase money, perhaps to assignees, and up to the time of the registration of a transfer to them, the agreement held by the Trust Investment Company may, simply by notice of the supposed equity of the plaintiff, be subject to be defeated thereby. That such a result is possible, at all events where the Real Property Act is involved, is difficult, I must acknowledge, for me to imagine. That many large transactions have no stronger foundation need hardly be said. In many cases contracts have been made for sales again in reliance of such agreements with the registered owner, supported by the usual caveat.

Section 71 of the Real Property Act declares the effect of the certificate of title as conclusive evidence that the person named therein is entitled to the land for the estate or interest specified.

Section 91 reads as follows: "91. Except in the case of fraud on the part of such person, no person contracting or dealing with, or taking or proposing to take an instrument from, a registered owner shall be required or in any manner concerned to inquire into or ascertain the circumstances under, or the consideration for which, such owner or any previous owner is or was registered, or to see to the application of the purchase money or of any part thereof; nor shall any person be affected by notice, direct, implied or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust

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or unregistered interest is in existence shall not of itself be imputed as fraud."

Section 130 declares that any person claiming an estate or interest in land under the new system may file a caveat, etc.

Section 143 says that registration by way of caveat shall have the same effect as to priority as the registration of any instrument under the Act.

It seems to me that sections 71 and 91 of the Act conclusively establish the right of the Trust Investment Company. Section 91 means nothing if it does not mean that an innocent person may safely contract or deal with a registered owner without inquiry. It certainly cannot mean that, though he need not inquire at the time of innocently contracting, yet, if he gets the notice later and before completion, his contract shall be affected, possibly nullified, thereby. In short, I take it that the contract is protected throughout, from its inception to its termination by completion or otherwise. If the Act were meant to protect only such transactions as are specifically dealt with in the Act, *e.g.* actual transfers, mortgages, incumbrances and leases, the words "contracting or dealing with" would not be merely surplusage, but would be misleading.

I am prepared to hold that, on the facts admitted on the pleadings, the rights of the Trust Investment Company under its contract with the Trusts and Guarantee Company are not affected by the claims of the plaintiffs as set out in the statement of claim.

Aside from all this it seems to me that the statement of claim itself shows an estoppel against the plaintiff in favor of this defendant, as he gave Anderson the power of attorney whereby Wickson and The Trusts and Guarantee Company were eventually held out as owners.

In view of the agreement between the parties that I should make such order as upon the pleadings should

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seem proper with reference to the defendant The Trust Investment Company, the matter is virtually being dealt with as an application for judgment upon admissions under Rule 615. The position of this defendant is distinct and severable from those of the other defendants. The rule says it shall not be necessary to wait for the determination of any other question between the parties, which, I take it, means all or any of the parties. It would be an injustice to keep the Trust Investment Company's position in suspense until the termination of what promises to be a tedious litigation. This rule may be applied where the judgment would be final and not merely interlocutory: *Re Barker's Estate,* 10 Ch.D. 162, at 165; *Holmsted & Langton,* 3rd ed. 817.

The case might, as to this defendant, be likewise dealt with under rule 616.

An order will go directing the entry of judgment dismissing the plaintiff's action as against the Trust Investment Company with costs. That defendant may be quite willing to avoid further connection with the litigation, and may, should it so desire, withdraw its counterclaim without costs. As to the other defendants the costs of this motion will be costs to them in the cause.

Plaintiff appealed.

W. M. Crichton and *E. A. Cohen* for plaintiff.

P. J. Montague for defendant Anderson.

A. C. Galt, K.C., for Trusts & Guarantee Co.

M. J. Finklestein and *E. R. Levinson* for Trust Investment Co.

The following is a copy of the judgment of the Court:

" This case coming on by way of appeal from the judgment pronounced by Mr. Justice Robson, and it being alleged that one A. Orpen is interested in the subject matter of the suit, it is deemed advisable that the judgment pronounced herein be set aside and the suit re-in-

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stated in the same position as it was before the judgment was pronounced.

Without deciding the questions of law involved in this matter, it is ordered that the judgment be set aside and vacated.

The costs of this appeal and of the proceedings before Mr. Justice Robson to be costs in the cause.

All parties to have leave to amend as they may be advised. Plaintiff to amend within 8 days from issue of this order; defendants within 8 days after service of plaintiff's amendment."

[Subsequently to the foregoing decision of the Court of Appeal, a notice of motion was given by the defendant, The Trust Investment Company, for the re-instatement of the appeal on the ground that one Orpen referred to in the statement of defence of the defendant, The Trust Investment Company, had disclaimed all interest in the property, the subject matter of the action.

The Court decided not to entertain this motion and dismissed same without costs. Ed.]

BERGMAN v. COOKE.

Before MATHERS, C.J.K.B.

Vendor and purchaser—Sale of land subject to highway—Time as the essence of the contract.

The agreement in question provided that the defendant should have the privilege, at any time within one year from its date, of transferring to the plaintiff a half section of land with a clear title, in lieu of a payment of $6400 in cash due at the end of the year on the defendant's purchase of the property in question. The defendant's certificate of title to the half section excepted out of it eight acres for a public highway, and he was unable to get in title for the eight acres until after the expiration of the year.

Held, that the plaintiff was not bound to accept title to the half section subject to the highway, that the defendant was not entitled to a reasonable time after the end of the year to remove the defect and that the plaintiff was entitled to judgment for the $6400 in cash besides the other money due under the agreement.

Vanderlip v. *Peterson*, (1906) 16 M.R. 341, and *Paterson* v. *Houghton*, (1909) 19 M.R. 168, followed.

DECIDED: 15th July, 1912.

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Statement

THE plaintiff brought this action to recover the purchase price of an apartment block sold by him to the defendant under an agreement dated 1st March, 1911.

The purchaser had the option under the agreement to transfer to the plaintiff, within one year, in lieu of a portion of the purchase money, certain farm lands near Balmoral and Westbourne. The Westbourne lands were transferred within the year, but the certificate of title for the Balmoral lands excepted out of the property, for a public highway, about eight acres of land.

The plaintiff refused to accept the property less the eight acres for right-of-way, and on the expiration of the year brought this action to recover the balance of the moneys due to him on the purchase, in lieu of the lands which had not been transferred to him.

C. P. Wilson, K.C., and *H. A. Bergman* for plaintiff cited *Vanderlip* v. *Peterson*, 16 M.R. 341; *Paterson* v. *Houghton*, 19 M.R. 168, 175, and *Raymond* v. *Knight*, 2 Alt. L.R. 157.

H. Phillipps and *H. W. Whitla* for defendant.

MATHERS, C.J.K.B. This is an action to recover the purchase price of an apartment block sold by the plaintiff to the defendant under an agreement dated 1st March, 1911. The total purchase price was $48,000, payable by deferred payments extending from the execution of the agreement to the 1st March, 1916. There was a mortgage on the land for $19,500, which was to be deducted from the purchase price.

Of the deferred payments the sum of $14,720 was to fall due on the 1st of March, 1912. The agreement provided that the purchaser should have the privilege, at any time within one year from its date, of transferring to the vendor, by a transfer under the Real Property Act free and clear of all incumbrances, the south half of section one, in township fifteen and range two, west of

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the principal meridian in Manitoba, and upon so doing he should receive a credit of $6400 on the payment to be made under the agreement on the 1st of March, 1912.

The agreement also gave the purchaser the privilege, at any time within a year, of transferring to the vendor certain other farm lands situate at Westbourne and, upon so transferring these latter lands, to receive a credit of $7820 on the payment to fall due on the 1st of March, 1912.

These latter mentioned lands were transferred and the defendant became entitled to the credit of $7820.

The chief dispute in this action is centred on the question of whether or not the defendant had become entitled to the credit of $6400 by the transfer of the first mentioned lands.

It appears that these lands were crossed diagonally by a highway one and one-half chains wide, which highway was shown by a plan registered in the Land Titles Office, and to the portion occupied by this highway the defendant had no title. In November, 1911, the plaintiff's solicitors discovered the presence of this highway and notified the defendant's solicitors that title subject to that highway would not be accepted. The attitude of the defendant at first was that the plaintiff was bound to accept the land subject to the highway, and no attempt was made by him to have it closed and procure title to it for the purpose of conveying it to the plaintiff until a few days before the 1st of March, 1912. Steps were then taken to close the highway, but as a matter of fact it was not closed nor title procured to it until some time after that, and the defendant had not applied for a title under the Real Property Act to this portion of the half section until after the trial of this action had commenced.

Prior to the 1st of March the defendant's solicitors tendered to the plaintiff's solicitors a transfer of the half

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section under the Real Property Act, subject to the highway. This transfer was rejected. Subsequently the defendant's solicitors registered this transfer and procured a certificate of title to issue subject to the highway in the name of the plaintiff and sent such certificate of title to the plaintiff's solicitors. They, however, adhered to their refusal to accept the title in that form and subsequently re-transferred the land to the defendant.

The defendant claims, first, that the plaintiff was bound to accept title subject to this highway; second, that, if not, the defendant was entitled to a reasonable time after the 1st of March to remove the defect.

I do not agree with either contention.

The agreement gives the defendant the privilege, within one year, or before the 1st of March, 1912, of transferring the south half of section 1 in township 15, range 2, west of the principal meridian in the Province of Manitoba, free and clear of all incumbrances, and upon doing so, he was to be entitled to a credit of $6400. No reference is made to the highway in the agreement, or to any other charge or incumbrance upon the land. The description of the land given, in my opinion, includes all the land shown by the Dominion Government survey to be included within the half section named, and the plaintiff was not bound to accept anything less.

As to the defendant's second objection, I think that equally untenable. The agreement provided for a cash payment on the 1st of March, but gave him the option on or before that date of transferring the land under the Real Property Act. Upon compliance with that provision he became entitled to the credit, otherwise not. The evidence shows that he did not, and could not, convey the land until after the 1st March, and therefore I think he was not entitled to the credit: *Vanderlip* v. *Peterson,* 16 M.R. 341, and *Paterson* v. *Houghton,* 19 M.R. 168, at 175.

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The only other point in dispute was as to a certain payment made by the defendant to a man named Eidsvig. Eidsvig was the agent who had made the sale on behalf of the plaintiff and thereby became entitled to a commission of $1225. By an agreement made between Eidsvig and the plaintiff, Eidsvig agreed to accept payment of this commission, $250 cash, which was then paid, and the balance $975 as the payments from the defendant to the plaintiff fell due, Eidsvig being entitled to be paid half of each until his balance of $975 was fully paid.

Under the agreement $500 was to fall due on the 1st day of March, 1911. That sum was paid, and out of it the defendant, by the plaintiff's authority, paid Eidsvig $250. $500 more fell due on the 1st of September, 1911, and out of this sum the defendant, by the authority of the plaintiff, again paid Eidsvig $250. This left $475. No other payment fell due under the agreement until the 1st of March, 1912.

The defendant claims to have paid Eidsvig $500 on 26th February, 1912, or $25 more than the plaintiff owed Eidsvig. This latter payment the plaintiff disputes. The evidence shows that as a fact no payment was made by the defendant. The story as related by Eidsvig is that in the fall of 1911 the defendant endorsed his note for $750 and that he paid $250 upon it when due and renewed it for $500, that when the renewal fell due he did not pay it. He then owed the defendant an account for board and gave him a receipt on the 26th February for the $500. The agreement between Eidsvig and Bergman was not an order on Cook, nor did it in any way authorize him to make payments to Eidsvig. It was an agreement between Eidsvig and Bergman alone for the settlement of the commission due by the latter to the former. The two first payments made under it were expressly authorized by Bergman. The latter payment

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of $475, or as a fact $500, was unauthorized by Bergman and Cook is not entitled to credit for it.

I must, therefore, find that the defendant was in default in making the payment which fell due on the 1st of March, 1912. The agreement provided that, on any default in the payment of any instalment of either principal or interest, the whole of the principal and interest payable thereunder to the vendor should at once become due and payable.

On the 2nd March, 1912, the plaintiff notified the defendant in writing that, as he had made default in payment which was to be made on the 1st of March, the whole of the balance of principal and interest secured by the agreement became at once due and payable and he therefore declared the whole of the principal and interest due and payable forthwith.

The plaintiff is entitled to judgment for the whole amount of the principal money and interest payable under the agreement which fell due on the 1st day of March, 1912, and which was subsequently to fall due, less the sum of $7820 to be credited on the 1st day of March, 1912, in respect of the Westbourne lands and $19,500 to be deducted in respect of the mortgage. If the parties cannot agree upon the computation of this amount the calculations will be made by the Registrar. The plaintiff is entitled to the costs of the action.

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COLONIAL ASSURANCE CO. V. SMITH.

Before MATHERS, C.J.K.B.

Company—Use of name of company in action by majority of shareholders—By-laws—Proxies at meetings of shareholders—Election of directors.

1.. If there is no express provision in the Act of incorporation of a company, or in its by-laws duly passed, preventing it, a shareholder may be represented at a meeting of the shareholders by a person who is not a shareholder as his proxy when the Act gives the right to vote by proxy.

2.. When the Act of incorporation of a company gives the directors the power to make by-laws, subject to confirmation at the next general meeting of the shareholders, and says nothing about the shareholders themselves making by-laws, the latter have no power to do so and any by-laws passed by them at a general meeting are void and of no effect.

Kelly v. *Electrical Construction Co.*, (1907) 10 O.W.R. 704, followed.

3.. When the Act provides that the election of directors shall be by ballot, it is not competent to the chairman of the meeting to receive nominations and, in the absence of other nominations, to declare the persons nominated to be elected without taking a ballot.

4. When it is shown that a clear majority of the shareholders present or duly represented by proxy were opposed to the election of the persons declared by the chairman to have been elected as directors, the election should be set aside and declared void and a new election ordered.

5.. A majority of the shareholders of a company have the right to use the name of the company in an action for a declaration that the persons claiming to have been elected directors were not duly elected and for an order expelling them from that office as usurpers: *Lindley*. 772.

DECIDED: 9th July, 1912.

Statement

ACTION brought in the name of The Colonial Assurance Company and A. H. Correlli, R. M. Simpson and Jasper Halpenny, on behalf of themselves and all other shareholders of the Company, to set aside the election of the defendants as directors of the Company at the annual meeting held on the 14th February, 1912, on the ground that such election was illegal and void, and for other incidental relief.

G. A. Elliott and *W. L. McLaws* for plaintiffs cited *Kelly* v. *Electrical Construction Company*, 10 O.W.R.

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704; *Ernest* v. *Loma,* [1897] 1 Ch. 1, and *Pender* v. *Lushington,* 46 L.J. Ch. 317.

T. H. Johnson for defendants cited *Kelly* v. *Electrical Construction Company,* 10 O.W.R. 706; and *Morden Woolen Mills* v. *Heckels,* 17 M.R. 557.

MATHERS, C.J.K.B. At the meeting in question the shareholders were divided into two factions. Those favorable to the present defendants were F. Crossley, holding 60 shares; Wm. Smith, 210 shares; Mrs. Wm. Smith, 50 shares; J. M. Dick, 50 shares; James Hooper, 50 shares; J. L. Nelson, 100 shares; Geo. Leslie, 40 shares; Wm. Manahan, 50 shares; Total 610 shares.

In addition to above there were present in person or by proxy the following shareholders:

L. W. Hill, per proxy to W. B. Thompson, 200 shares; W. P. Davidson, per proxy to Jas. Fisher, 200 shares; A. H. Correlli, in person, 100 shares; Geo. Glines, per proxy to A. H. Correlli, 100 shares; Thos. Wilson, per proxy to A. H. Correlli, 100 shares; R. M. Simpson, in person, 100 shares; J. Halpenny, per proxy to R. M. Simpson, 100 shares; Nellie Halpenny, per proxy to B. C. McMillan, 5 shares; B. C. McMillan, per proxy to A. H. Correlli, 20 shares; J. J. Foot, per proxy to A. H. Correlli, 20 shares; Jerry Robinson, per proxy to A. H. Correlli, 50 shares; W. J. Hammond, per proxy to A. H. Correlli, 100 shares; Total, 1095 shares.

At a meeting of the shareholders of the Company held the 16th day of February, 1905, what purport to be general by-laws were passed. Of these by-laws clauses six and thirteen are as follows:

Sec. 6. "The election of directors and all other matters brought before the annual or special meetings of the company shall be decided by a majority of the shareholders present in person or as represented by proxy. A poll may be demanded by any of the shareholders present, in which event each share represented in person or by proxy shall be entitled to one vote."

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Sec. 13. "No person not being a shareholder or any shareholder not having paid the calls upon his shares can take part at any meeting of the company and no person shall be deemed a shareholder unless his name appears as such upon the books of the company."

Before the election of directors was taken up the question of those entitled to take part in the meeting under the above quoted by-laws was discussed. Neither W. B. Thompson nor James Fisher, who were present as proxies, for L. W. Hill and W. P. Davidson, respectively, was a shareholder, and the defendant Smith, who was chairman of the meeting, ruled that they could not, for that reason, represent the shareholders named. The chairman also ruled that the plaintiffs Simpson and Halpenny could not take part, because they were in default for calls upon their shares. Each of them had given the company his promissory note to cover the call and these notes were accepted by the company. I gather that Halpenny's note was still current and therefore I think he was not in default and had a right to vote. The plaintiff Simpson's note at the time of the meeting was overdue and unpaid. At the meeting he tendered his cheque in payment, but the chairman refused to accept it on the ground that it was not legal tender, and ruled that he could not take part in the meeting or vote on his shares. There was a good deal of excitement and angry discussion because of these rulings of the chairman and the plaintiff Correlli protested vigorously. When the business of electing directors was reached, the chairman called for nominations. The five defendants were then nominated. Correlli protested against the proceedings, but no other names were put in nomination and, without taking a ballot or calling for a vote, the chairman declared the defendants duly elected.

It is admitted that if Hill, Davidson and Simpson had been permitted to vote they would have voted against the defendants. As Hill, Davidson and Simpson held 500

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shares and Correlli represented 490 shares, all which would also have gone against the defendants, it is quite evident that in that event the defendants would not have been elected.

The company was incorporated by private Act of the Legislature of Manitoba, 52 Vic., c. 53, as "The Manitoba Assurance Association." The name was subsequently changed to that which it at present bears.

Section 12 provides that the directors shall be elected by ballot and shall hold office until their successors shall be appointed; that every shareholder shall be entitled to one vote for every share held by him for not less than 15 days prior to the time of voting on which all calls have been paid; that such votes may be given by proxy if the voter be not present; and that all questions proposed for the consideration of the meeting shall be determined by the majority of votes, the chairman having the casting vote in case of an equality.

Section 15 enacts *inter alia* that the directors shall have full power in all things to administer the affairs of the company and may from time to time make by-laws regulating the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of stock certificates, the transfer of stock, the declaring and payment of dividends, vacancies among the directors, the number of directors within the limits provided by the Act, the quorum both at meetings of shareholders and directors, the right and manner of voting by proxy and the conduct and management in all other particulars of the affairs of the company, etc., but every such by-law, unless in the meantime confirmed at a general meeting of the company duly called for the purpose, shall only remain in force until the next annual meeting of the company, and in default of confirmation thereat shall from that time cease to have effect.

Simpson's right to vote did not depend upon the

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validity of the by-laws. His note was overdue and therefore he was in arrear for a call. The fact that he had been allowed to vote at previous meetings and that his cheque for the amount of his arrears was tendered to the president at the meeting and refused does not alter the question. By section 12 of the Act of incorporation only those whose calls are paid are entitled to vote. Simpson's call was not paid and he therefore had no right to vote. The chairman's refusal to allow Simpson to vote may, under the circumstances, be regarded as a piece of sharp practice, but I cannot say that he was not within his strict legal right.

The Act gives a right to vote by proxy and does not limit the choice of proxy to another shareholder. But by-laws may be passed regulating "the right and manner of voting by proxy" and in my opinion a valid by-law might be passed depriving shareholders of the right to appoint as proxy any person not a shareholder. The wording of the by-law in this case is that no person not being a shareholder can take part at any meeting of the company. That is sufficient, I think, to prevent a non-shareholder from representing a shareholder as proxy.

In the absence of any by-laws a non-member would have a right to represent a member as proxy. In *Lindley on Companies* 429, it is said: "a person present who is not a member, but is the holder of a proxy, is entitled to vote." See also *Ernest* v. *Loma,* [1897] 1 Ch. 1. The right of Hill and Davidson to have voted by their respective proxies depends therefore upon the validity of the by-laws. The objection is that the power to pass by-laws is, by section 15, conferred upon the directors, and that by-laws passed by the shareholders are so much waste paper. The exact point was decided by Chief Justice Mulock in *Kelly* v. *Electrical Construction Co.,* 10 O.W.R. 704. The reasoning by which he arrived at

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the conclusion that, where the power to pass by-laws regulating voting by proxy was conferred upon the directors, it could not be exercised by the shareholders, appeals to me as being correct. I hold, therefore, that the alleged by-laws are void and that Hill and Davidson should have been permitted to vote by their respective proxies Thompson and Fisher. Halpenny was not present, but Simpson held his proxy. Although Simpson was in arrear for a call and could not vote in respect of his own shares, he had a right to represent Halpenny as his proxy. The evidence is conclusive that, with the exception of 610 shares, the shareholders present in person or by proxy representing 995 votes were opposed to the election of the defendants.

It is argued, however, that the election of the defendants was unanimous. It is a sufficient answer to say that section 12 of the Act requires the election of directors to be by ballot. The chairman ignored this provision and declared the defendants elected without ballot. This he had no power to do. A majority of the shareholders present might have voted against the defendants, although there were not more than the requisite number nominated.

It is also objected that the plaintiffs have no authority to use the name of the Company. The action is in effect to have it declared that the defendants are usurpers who have assumed the office of directors without having been elected thereto. In such a case the majority of the shareholders have a right to use the name of the Company for the purpose of expelling them. Such an action would only be stayed if it appeared that a majority of the shares was opposed to it: *Lindley on Companies*, 772.

There will be judgment setting aside the election of the defendants as directors of the Company and declaring such election void; that a meeting be held at the office of the Company in the City of Winnipeg on Monday the 29th day of July, 1912, at the hour of four o'clock in the

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afternoon for the purpose of electing directors in the place of those whose election is hereby set aside; that notice of such meeting shall be advertised for one week prior to the day of such meeting in one of the daily newspapers of Winnipeg, and notice thereof shall also be mailed in a registered packet, postage prepaid, to each person whose name appears in the books of the Company as a shareholder, such notice being addressed to such shareholders at their last known post office address, and shall be posted at least seven days before the day of meeting; that such notice shall be approved by the Prothonotary and be published and mailed by the secretary of the Company; that such of the defendants who were not directors prior to said election be, and they are hereby, restrained from acting as such or interfering in the business of the Company; a declaration that the board of directors who were in office immediately prior to such election are the directors of the Company and shall continue in office until their successors are appointed as herein provided.

The plaintiffs are entitled to the costs of this action.

IN THE COURT OF APPEAL.

HALVORSON v. BOWES.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

Partnership—Agreement to enter partnership—Stipulation for execution of articles of partnership.

Action for an account of an alleged partnership between plaintiff and defendant as restaurant keepers.

Robson, J., at the trial, dismissed the claim for an account, holding that no partnership had been entered into, but, pursuant to an amendment at the trial, directed a reference to the Master to ascertain the proper sum payable to the plaintiff for his services

Plaintiff appealed.

Held, per RICHARDS AND PERDUE, JJ.A., that a partnership exists as soon as the parties begin to engage in business together with a view to their mutual profit, although they contemplate the

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signing of a formal partnership agreement and never sign it: Partnership Act, R.S.M. 1902, c. 129, ss. 4, 22; *Lindley on Partnership*, 7th ed. 15, 731.

Syers v. *Syers*, (1876) 1 A.C. 174; *Battley* v. *Lewis*, (1840) 1 M. & G. 155, and *England* v. *Curling*, (1844) 8 Beav. 129, followed.

Further, that, in their view of the effect of the evidence as set out in their judgments below, a partnership had existed between the parties from 23rd January to 7th July, 1911, and that the plaintiff was entitled to an account of the profits of it, although the contemplated agreement of partnership had never been prepared or signed and the plaintiff had withheld his promised contribution to the capital pending such signature.

Held, *per* CAMERON, J.A., HOWELL, C.J.M., concurring, that, in his view of the effect of the evidence as set out in his judgment below, the parties had never arrived at an agreement as to the terms of their contemplated partnership and no actual partnership between them had ever been created, and that the judgment of the trial Judge should be affirmed.

The Court being equally divided, the appeal was dismissed without costs.

DECIDED: 10th June, 1912.

Statement

THIS action was brought to take the accounts of a partnership between the plaintiff and defendant as restaurant keepers, which partnership the statement of claim alleged "was undertaken on the 23rd day of January, 1911, and continued until Friday the 7th day of July, 1911, when the same was terminated." It was further alleged that it was agreed that the plaintiff should contribute $1,500 to the capital and the defendant $6,500, and that each of the partners could withdraw $75 per month on account of his share of the profits. It was not alleged, however, that these things were done except that it was stated that the plaintiff received $75 a month for five months. The statement of defence denied these allegations and asserted that whatever negotiations took place between the parties were never consummated.

Robson, J., dismissed the plaintiff's claim for an account, but, pursuant to an amendment at the trial, directed a reference to the Master to ascertain the proper sum payable to the plaintiff for his services.

Plaintiff appealed.

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R. M. Dennistoun, K.C., and *C. H. Locke* for plaintiff, appellant, cited *Ex. parte Hayman*, 8 Ch. Div. 11; *England* v. *Curling*, 8 Beav. 120; *Scott* v. *Rayment*, L.R. 7 Eq. 112; *Byrne* v. *Reid*, [1902] 2 Ch. 735, 744; *Battley* v. *Lewis*, 1 M. & G. 154; *Syers* v. *Syers*, 1 A.C. 174, 181; *Codville* v. *Smart*, 15 O. L. R. 357; *Carter* v. *Scargill*, L.R. 10 Q.B. 565, and *Southern* v. *Haas*, 33 N.W.R. 657.

F. J. G. McArthur for defendant, respondent, cited *Osthman* v. *Carlson*, 12 O.W.R. 1209; *Oakes* v. *Stephens*, 14 O.W.R. 189; *Cameron* v. *Suttles*, 7 W.L.R. 686; *Garbutt* v. *Marshall*, 17 W.L.R. 285, and *Pierce* v. *Waldman*, 17 O.W.R. 419.

RICHARDS, J.A. The question in this case is one merely of fact, as I see it.

The evidence, I think, shows that the plaintiff and defendant did actually, while in Milwaukee, and before coming to Winnipeg, enter into an agreement of partnership, and that they would, in fact, have then had its terms put in writing, but that the witness Lesser persuaded them that, as the partnership was to be carried on in Manitoba, it would be better to have the writing drawn in Manitoba.

The terms of the partnership were, as I understand the evidence, that the capital of the partnership should be the total sum that the business should, after it had become established, or become a failure, be found to have then cost, and, that, if a success, the plaintiff's interest in the business and its profits (if any) should, as against the defendant's, be the proportion that $1,500 should be found to bear to the balance remaining of the above total sum, after deducting $1,500 therefrom.

Though the above proportions were in fact unknown when the agreement was made, they were capable of being definitely ascertained after the business had become established or a failure, so that the agreement does not seem

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incomplete because of uncertainty as to the individual interests of the partners.

If the business had been a failure, then I think the terms agreed on would have made the plaintiff, as between him and the defendant, liable to contribute towards the loss in the proportion that $1,500 bore to the balance of the total sum put into the venture, after deducting $1,500 from that total.

The actions of both parties show, in my opinion, that they fully understood the terms to be as above. They came to Winnipeg in pursuance of their verbal agreement, and started the business. Except as to the payment in of his cash contribution and the giving of his note, the plaintiff did, in the carrying on of the business, exactly what it had been agreed in Milwaukee that he, as a partner, should do. It is not pretended that the plaintiff went into it under any contract of hiring, or agreement to be paid merely for his services.

It is true that the plaintiff did not put in the $750 that he agreed to put in in cash, or give the note for $750, that he was to give. But the defendant's refusal, or delay, to enter into written terms, as had been agreed between them, really, I think, caused the plaintiff's delay so to do. In any event, he could, in the taking of accounts, be charged with those sums with interest.

There are several circumstances any one of which, taken singly and without reference to the other matters in evidence, would be strong evidence for, or against, the plaintiff's contention. But the evidence as a whole, and particularly the petition for incorporation which the defendant caused to be prepared, seem to point to the defendant having recognized, and been prepared to admit, the plaintiff's claim that he was, in fact, a partner in the business.

I would reverse the finding of the learned trial Judge,

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and declare the existence of the partnership. As that finding, however, stands, because of this Court being evenly divided as to allowing or dismissing the appeal, it is not necessary here to go into the working out of the judgment that I think should be pronounced.

PERDUE, J.A. The evidence clearly shows that the defendant offered the plaintiff in Milwaukee a partnership in the business the defendant contemplated commencing in Winnipeg, under the name of "The Bowes Dairy Lunch." This offer was accepted by the plaintiff. He gave up a situation in which he was earning $100 a month and had the promise of $125 a month if he would remain, came to Winnipeg about the end of January, 1911, helped to organize and open the business and gave all his time to it until 7th July, 1911. The terms of the intended partnership, as arranged in Milwaukee, are proved by the plaintiff and by Lesser, who was present at the interview between the parties when the terms were agreed on. Lesser's evidence as to the agreement shows that Hallvorson was to have a $1,500 share in the business and was to participate in the profits in the proportion which $1500 would bear to the balance of the cost of establishing the business. It was expected this cost would be $6,000 or $7,000, but not over $9,000. Of the $1500 Hallvorson was to pay $750 in cash and give his note for $750. Bowes was to supply the rest of the capital. Lesser advised the parties not to put the agreement in writing while in Milwaukee, for fear it might not comply with the laws of Manitoba, and to wait until they got to Winnipeg where the formal agreement could be made.

The defendant corroborates the evidence of the agreement made in Milwaukee. He says: "I told him if he wanted to go in with me I would give him $1500 interest for $750 and give me a note for $750 and let the business pay the other $750 and he said it was all right." It was further arranged that the plaintiff was to draw $75 a

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month and the defendant $150 a month on account of profits.

In accordance with the above arrangement the plaintiff gave up his situation and came to Winnipeg, arriving here about the end of January. He immediately set to work to help the defendant get the business of the Bowes Dairy Lunch organised and put in operation. From the time he arrived until 7th July, the plaintiff appears to have given all his attention to the business. The lunch room appears to have been kept open all night and the plaintiff took charge of it from 7 o'clock in the evening until 7 o'clock in the morning. He states that up to 1st June he worked fifteen to eighteen hours a day.

When the plaintiff arrived in Winnipeg he had with him his $750. The defendant asked him for the money intending to put it in his own private account. The plaintiff objected to this until their agreement was put in writing. The defendant said: "All right we will fix it up in the next day or two." Although spoken to on several occasions by the plaintiff and urged to have the partnership articles drawn up and signed, the defendant evaded this and no written articles were signed. In the meantime the plaintiff retained the $750 in cash and never gave a note. The evidence shows that the plaintiff's services were the main thing the defendant desired to secure, and these were given in the fullest manner. Defendant admits he did not require the plaintiff's $750. It is easy to surmise why the defendant kept putting the plaintiff off after the business was started, and refusing to sign any partnership agreement. The business from the very outset proved to be a phenomenal success. The receipts were $80 at the first meal and the daily receipts went as high as $527. The defendant evidently considered the business so valuable that he determined to exclude the plaintiff, if he could, from any interest in it.

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This is the view I take of his conduct as disclosed in the evidence.

On one occasion the defendant told the plaintiff that he, the plaintiff, was making from 150 to 200 per cent. on his money. As further proof of the fact that the parties were working together as partners it was shown that the defendant introduced the plaintiff to the bank manager and to another person as his partner. In June a petition for incorporation of the business under the Joint Stock Companies Act was prepared at the instance of the defendant and was signed by both him and the plaintiff. The petition shows on its face that the capital stock was to be $10,000, of which the plaintiff was to have $1,500 and this was declared paid by the plaintiff by his "transfer of interest of assets and good will of Bowes Dairy Lunch, Winnipeg." The defendant changed the amount of the proposed capital from ten thousand, as at first agreed, to thirteen thousand dollars, giving an additional three thousand dollars to his wife. The plaintiff and he had a disagreement, in reality over another matter, and the plaintiff left.

The learned trial Judge has found that the parties became of one mind in Milwaukee that a partnership should be formed, but that the intention was that a formal writing setting out the terms should be made. He takes the view that, in the absence of the "intended formal agreement and no contribution of capital, as was essential," there was no concluded contract between the parties. Now "partnership" is defined by section 4 of the Partnership Act as "the relation which subsists between persons carrying on a business in common, with a view of profit." The comment by the authors of *Lindley on Partnership* upon this definition is: "It is not always easy to determine whether an agreement amounts to a contract of partnership or only to an agreement for a future partnership. If the parties to the agreement have

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begun to carry on business, although prematurely, they will be partners": *Lindley on Partnership,* 7th ed. 15. Where there has been a part performance by the parties actually engaging in business together with a view to profit, this in itself constitutes a partnership. This is the case although the parties contemplate signing a formal partnership deed and never sign it: *Syers* v. *Syers,* 1 A.C. 174. The question in such a case is not, when was the agreement executed? but rather this, when did the partners commence to carry on business on their joint account? See *Lindley on Partnership,* 7th ed. 731, and *Battley* v. *Lewis,* 1 M. & G. 155. The latter case shows that, where parties acted as partners but the partnership deed was not executed until afterwards, they were to be regarded as partners from the time when they acted together as such.

In *England* v. *Curling,* 8 Beav. 129, three persons agreed to become partners and signed, in initials, a draft agreement for a partnership. A deed was prepared to carry into effect the terms of the agreement, which underwent some alterations, but was never executed. The parties, however, commenced to carry on the business together. A decree for specific performance of the partnership was granted. Lord Langdale, M.R., said: "With respect to a partnership agreement, it is to be observed that, all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variations from day to day, and the terms of such variations may not only be evidenced by writing but also by the conduct of the parties in relation to the agreement and to the mode of conducting their business. * * * Partners, if they please, may, in the course of the partnership, daily come to a new arrangement, for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the partners." In that case,

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it being uncertain what were the actual terms of the partnership, a reference was directed to the Master to ascertain what these terms were and to settle a deed of partnership in accordance with them. See also Partnership Act, section 22.

In the present case it has been shown that the terms of the partnership were agreed upon in Milwaukee, that the plaintiff came to Winnipeg in pursuance of that agreement and that the parties did actually commence business and work together with a view to profit. The plaintiff was either a partner of the defendant or was simply the hired servant of the latter. It is impossible to believe that the plaintiff left his home, gave up his situation in Milwaukee where he could earn $125 a month and came to Winnipeg in order to work fifteen hours a day for the defendant at $75 a month. The trial Judge very properly disbelieved the defendant's evidence as to a hiring and directed that plaintiff should be paid for his services on a *quantum meruit*. This necessarily implied that the relationship of master and servant subsisted between the parties, a conclusion which, in my opinion, is not warranted by the facts.

With deference, I do not agree with the finding of the learned trial Judge that the payment of the $750 by the plaintiff was essential to the formation of the partnership. If the parties commenced to do business in common with a view to profits, as I think the evidence clearly establishes, the failure of the plaintiff to contribute the capital agreed to be contributed by him did not cause him to cease being a partner. He was chargeable with the capital he should have contributed and liable to pay interest on it, but he was, nevertheless, a partner: Partnership Act, ss. 27 (*c*), 47; *Venning* v. *Leckie*, 13 East, 7; *Nowell* v. *Nowell*, L.R. 7 Eq. 538.

It appears to me that the evidence in this case leads to one conclusion, that the plaintiff and defendant were

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partners at will in the business from the time they commenced to work together until the plaintiff left. The terms were those agreed upon in Milwaukee. The plaintiff had a $1,500 interest in a business whose capital was not to exceed $9,000. The plaintiff did not pay in his $750 in cash and give his note, but delay in doing this was permitted by a mutual agreement that, when the formal articles were prepared and signed, the money and note would be given. The plaintiff's share of the assets and profits should therefore be charged with the $1,500 he agreed to contribute as capital and interest on that sum at the legal rate. Any sum advanced to the business by the defendant in excess of the portion of the capital he was to advance should be repaid to him out of the assets with interest at the legal rate. In other respects the usual judgment should be pronounced to wind up the partnership and distribute the assets, unless the parties agree on the amount to be paid to the plaintiff.

I think the defendant should pay to the plaintiff the costs in the Court of King's Bench up to and including the trial and also the costs of this appeal. The costs of the reference to the Master should be reserved to be dealt with by the presiding Judge at the hearing on further directions.

CAMERON, J.A. The contract alleged in the pleadings is certainly not that set up by the plaintiff in his evidence. The plaintiff was, on his evidence, to contribute, not $1500 but $750 and a note for $750 which was to be paid out of his earnings from the business. The defendant's contribution was to be the amount it cost to establish the business in Winnipeg. The plaintiff says (p. 14), "To erect it he said it would cost something like six or seven thousand dollars and we didn't think it would run over nine thousand dollars, but we thought there might be a possibility of it running to nine thousand dollars." There is nothing in his evidence about the $6,500 which the defendant was

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to contribute, according to the statement of claim, nor is there anything in his examination in chief with reference to the $75 to be paid to each of the partners monthly on account of profits. On cross-examination he states that he (the plaintiff) was to draw $75 a month and the defendant $150, but whether this was to be on account of profits or exclusive of profits does not appear.

Nowhere in the plaintiff's evidence do I find any statement that the amount expended by defendant in establishing the business had been ascertained as a basis for the partnership agreement. He says Bowes told him it amounted to about $13,000, but this was for the purposes of the proposed incorporation to which the plaintiff says he never really acceded, though he signed the petition for incorporation. There was no time fixed during which the partnership should continue, nor any definite time when it should commence, except that the plaintiff says it was to begin as soon as he came to Winnipeg. (p. 30).

According to the plaintiff the question of a written agreement was brought up at Milwaukee (the former residence of the parties) in the presence of Mr. Lesser, a friend of both. He (the plaintiff) says at p. 15:

"I said it was hardly fair to ask me to leave the employment of the United States Gypsum Company without something to show what I was doing. I wanted to see this thing in such form that I would have something in black and white and Mr. Lesser interrupted and said, 'It is a question of whether it is advisable that you should go into this that way, any partnership you form down here might not be legal in Manitoba because it would be legal here, and consequently it is best for you to wait until you get to Winnipeg and have it fixed up.'"

"Q. Have what fixed up? A. The partnership, to have it put in legal form, and that was the understanding."

The plaintiff came to Winnipeg, bringing with him his $750 and, on arrival, met the defendant who took him to the Traders Bank. The defendant there asked the plaintiff for the $750. To this the plaintiff replied: "Bert, that

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is all right, but you know what our agreement was down below, that as soon as I came up here the whole thing was to be put into shape and we had arranged down below that the money would be forthcoming."

"Q. What did you mean by putting it in shape? A. Putting it in good legal form, what we had agreed to down below."

The plaintiff came to Winnipeg January 23, and the business was started February 16.

He was asked and answered the following questions, p. 18:

"Q. Between these dates was anything said about the partnership? A. I brought the matter up within a week or two after coming up here and he said, 'Let us get our contracts made first so that we may know what it is going to cost us before we get into any agreement,' and so I said nothing until after we opened up, and nothing was said to me."

The plaintiff never offered the defendant the money. "That question," he says at p. 21, "didn't arise until Sunday, June 4, when I informed him that unless he came down to what he had agreed to below so that I could have something to show for the relations between us, that I would leave the business on the 15th." The plaintiff says the defendant then raised the question of the money, whereupon the plaintiff went to see his friend Mr. Bonnet, and between them they drew up the terms of the agreement as he says he understood them. The following is a copy of the document:

"Winnipeg, Man., June 5, 1911.

"We hereby confirm verbal agreement entered into with Oscar Halvorson in December last, 1910, in Milwaukee, Wisc., U.S.A., which is as follows:— (1/4) One quarter, or whatever interest his investment shall amount to in the establishment of the Bowes Dairy Lunch at 280 Portage Ave., Winnipeg, Man., in consideration of which the said Oscar Halvorsen agrees to put into the business cash to the amount of seven hundred and fifty dollars ($750.00) and

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note signed, with interest at (6%) six per cent., for seven hundred and fifty dollars, said note to be paid for out of the earnings of his said interest.

It is further agreed that his salary is to be at the rate of seventy-five dollars per month ($75.00). Further, that we are each to draw a salary of .....

Further, that the profits or earnings of the business are to be declared at least every six months, unless otherwise stipulated in legal form hereafter.

We further agree to produce satisfactory agreement drawn up in legal form upon the said Oscar Halvorson producing said check and with note signed as agreed."

Signed:—

What is the contention on this appeal? It is not that set forth in the statement of claim. As I understand it, the contention presented to us is that the agreement, in respect of which relief is asked, arrived at in Milwaukee was that the plaintiff should invest in the business $1500, $750 cash and a note for $750 to be paid out of the earnings; that the defendant should advance whatever it might cost to establish the business (which was to be his contribution); that the parties should draw profits in proportion to their respective contributions; that it was to be a partnership at will; that it was to commence on the plaintiff's arrival in Winnipeg, and that the parties were to draw $75 and $150 per month respectively, but whether on account of or exclusive of profits was not made clear to us. It is further contended that there is no uncertainty as to the amount of the respective shares, as a reference to ascertain the cost of establishing the business can render the amount of the defendant's contribution, and therefore the respective proportions in which the parties were to share, certain. As to the written agreement to be drawn up, it is urged that that was simply for the purpose of setting forth in legal form what the parties had already fully and finally settled and determined at Milwaukee.

To deal with this last contention first. Such certainly was not the view of the plaintiff. He was to put $750 cash into

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the business, but when he came to Winnipeg he refused to do this. He said the agreement was to be put "into shape," "into good legal form," before the money was handed over to the defendant. He subsequently (as pointed out above) acquiesced in the defendant's claim that they should find out the cost of the contracts "before we get into any agreement." From the time of the meeting in the Traders Bank until June 5, the plaintiff never offered his $750. When he drafted the agreement of June 5, which embodied his views of its terms, he put in the last clause the following: "We further agree to produce satisfactory agreement drawn up in legal form upon the said Oscar Halvorsen producing said cheque and with note signed as agreed." I take the "We" to mean the defendant. Now this must surely show that the formal agreement was more than merely reducing to writing terms already fully settled and determined. The plaintiff's view evidently was that his entering into the agreement at all was conditional upon a formal written agreement, satisfactory to himself, being exhibited to him. The execution by the parties of the agreement was to be a condition precedent to his handing over his $750. There was to be no partnership until the $750 was paid and no $750 was to be paid until there was a satisfactory agreement. It was never, it seems to me, at any time in the contemplation of the parties that the plaintiff should have an interest in the business without the payment by him of the cash sum mentioned. Had he, however, paid over his $750 on his arrival, it might have been difficult to resist the conclusion that the relation of partnership had arisen. But the plaintiff refused to make this payment on the express ground that it was part of the original agreement that a formal agreement had to be drawn up, settled and signed before the payment was made.

An examination of the draft agreement of June 5 shows differences between it and the agreement alleged to have

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been entered into in Milwaukee. The provisions of the last two paragraphs are quite new. Moreover, the provision, "Further, that we are each to draw a salary of....," shows that then, on June 5, an important term was unsettled. And, even if the figures had been inserted, it would have been necessary to make it clear whether these salaries were included in or independent of profits.

Under the circumstances it seems to me impossible to hold on the evidence that there was any time when the terms of the alleged contract were agreed to, and the minds of the parties were at one.

If an incomplete, or tentative, or preliminary, contract was entered into in Milwaukee, an agreement really to enter into a formal written contract when all the terms were finally settled, it might be argued that, when the plaintiff came to Winnipeg and took an active part in the business, the parties then, by their acts and conduct, rescinded such previous preliminary agreement to enter subsequently into a formal contract, and that they then did, in fact, enter into a new contractual relation with each other constituting a partnership in law. This is, however, not the partnership here as that partnership is alleged in the statement of claim, nor is it the partnership as put forward on the argument before us, but it may be considered on the evidence as a possible ground for affording the plaintiff relief.

The parties were, of course, at liberty to throw overboard their previous negotiations and make a new contract if they so wished. If they did so, it would be for the Court to discover its terms. But, first of all, it is necessary to ascertain on the evidence whether such a new contractual relationship was in fact entered into by the parties after the plaintiff's arrival in Winnipeg.

In what capacity did the plaintiff regard himself as acting in the business from January 23rd until June 5th? Did he consider himself a partner or an employee? He

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evidently did not believe himself a partner, for he did not secure that formal partnership agreement which he deemed necessary and he did not pay, or offer to pay, his $750. He did not think, I take it, that he was entitled to draw dividends on an interest for which he was to pay $750 (or $1500) when he had not paid in anything. During that period he asked for no division of profits, and suggested nothing about past profits in his draft agreement. He signed no cheques and exercised no control in the business other than that which might well, and of necessity, be given to a subordinate.

There is no question that he expected, ultimately, more than the subordinate position he filled: that is to say, he was an employee who hoped, or, possibly, had been led to believe, that he might become a partner. He could have insisted upon a written agreement before he went to work, but he did not. And it may be said that he deliberately refrained from so doing and from imperilling his cash until he became certain of the success of the business, as it can also be said, on the other hand, that Bowes waited until success was assured before he decided to break off his relations with the plaintiff.

But we cannot enter, with accuracy, into the motives of the parties. We are confined to the evidence before us. When I examine the draft agreement of June 5, it seems to me that, on the face of it, it refers to the future and that it was intended to speak from and after June 5. Nowhere is it retrospective; nowhere does it refer to the past except in the reference to the preliminary verbal agreement. It says "whatever his interest shall amount to"; "which the said Oscar Halvorson agrees to put into the business"; "his salary is to be at the rate of"; "we are each to draw"; "the profits are to be declared"; "We further agree to produce." These expressions show that the plaintiff, so far as this document gives us information, did not

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consider himself a partner before June 5 or before the indefinite time referred to in the last clause. That is to say, he considered himself a person in the employment of the defendant, who had previously agreed at some future time to enter into a partnership relationship with him, provided an agreement satisfactory to both of them could be arrived at. And that then and not till then a partnership was to arise and his $750 to be payable.

What was there in the conduct of the defendant that would lend colour to this assertion that he considered the plaintiff a partner in his business? The defendant asked the plaintiff for the $750 when he arrived,—"he asked me to deposit my money in his account." Had the plaintiff acceded to this request and produced his promissory note for the $750 additional, I think the question would, in all probability, have been then settled. But the plaintiff refused to hand over his $750. That the defendant afterwards spoke of him as his partner (as is alleged) is not a matter to which, in my opinion, importance can be attached. It is a word of wide popular use and its use on such occasions as are mentioned in the evidence is not necessarily significant of legal consequences.

Outside of these incidents (which are not admitted by the defence) I can find no facts alleged that go to show an intention on the part of the defendant to take and hold the plaintiff as a partner. I would say, rather, that the plaintiff's own evidence is to the effect that he, the defendant, treated him, the plaintiff, after January 23, as his subordinate, and not as his co-partner, in the business.

In this case it is for the plaintiff satisfactorily to establish the facts on which he claims to be entitled to relief. I think he has failed in this. He has not shown a concluded agreement as alleged in his pleadings or on this argument, and he has not shown such acts and conduct on the part of the defendant and himself as, independently

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of the agreement alleged to have been arrived at in Milwaukee, would have pointed clearly to the conclusion that the parties had, after his arrival in Winnipeg, entered into a new contract of partnership entitling him to recover in this or any other action.

I think the judgment appealed from should be affirmed and the appeal dismissed.

HOWELL, C.J.M., concurred with Cameron, J.A.

The Court being divided the appeal was dismissed, without costs.

IN THE COURT OF APPEAL.

CONN v. HAWES.

GOWAN, Claimant.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Sale of goods—Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, *c.* 11, *s.* 3—*Delivery—Change of possession.*

The claimant in this interpleader issue bought the stack of hay in question from the execution debtor without getting any bill of sale or other instrument in writing. The hay was on the premises occupied by the latter and was left there by the claimant. The execution debtor vacated the premises in a few days thereafter and the claimant procured the consent of the owner of the premises that the hay might remain where it was. About a month afterwards the plaintiff issued a writ of attachment under which the hay was seized while still on the same premises, and he obtained judgment and execution in due course.

Held, that there was not an immediate delivery of the hay, followed by an actual and continued change of possession, and that the sale was, therefore, void under section 3 of The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11.

DECIDED: 24th June, 1912.

Statement

INTERPLEADER issue. On November 23rd, 1910, the claimant bought a stack of hay situate on section 36, township 12, range 16, west, the property of Mrs. Huneston, the mother-in-law of the defendant Hawes,

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who gave $5 in cash and the stack of hay in question to the claimant in payment of an over-due note of defendant. At the time of the sale, the plaintiff had no judgment against the defendant. Judgment was not obtained until March 14th, 1911. On December 22nd, 1910, the bailiff of the court acting under a writ of attachment seized the hay in question, the writ having been issued on the same date. Subsequently the claimant claimed the hay, and the bailiff interpleaded.

The case was tried before Judge Ryan who gave judgment for the claimant, deciding that there was not evidence to hold that the sale of the hay was made with intent to hinder, delay or prejudice creditors under section 38 of the Assignments Act; and that the issue of a writ of attachment, or seizing thereunder, was not an "action" or proceeding had or taken to impeach or set aside the sale. The interpleader summons issued by the bailiff did not issue until April 22nd, 1911, more than sixty days after the sale of hay to the plaintiff.

Plaintiff appealed.

H. R. Hooper for Conn, appellant, cited *Parkes* v. *St George*, 10 A. R. 496; *Jackson* v. *Bank of Nova Scotia*, 9 M. R. 75; *Brown* v. *Peace*, 11 M. R. 411, and *Empire* v. *Maranda*, 21 M. R. 605.

No one appeared for respondent, Gowan.

The judgment of the Court was delivered by

HAGGART, J.A. On the trial of an interpleader issue the County Court Judge decided in favour of the claimant Gowan, and against the execution creditors, Robert Conn & Son, who appeal on two grounds: the first being that the sale was void as against the execution creditors under section 3 of The Bills of Sale & Chattel Mortgage Act, and the second that the transfer was preferential and void under The Assignments Act.

The claimant's version of the transaction is that, being

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the holder of a promissory note made by the execution debtor for $36.50, it was agreed between them that the note should be given up to the execution debtor for the stack of hay in question and $5.00 in cash. The stack was on the premises occupied by the execution debtor Hawes, where it continued to remain. Hawes in two or three days thereafter vacated the premises. Gowan the claimant says he asked the consent of the son of the owner of the land to allow the hay to remain where it was and the son consented. This happened in November, 1910, and within a month thereafter the execution creditor issued a writ of attachment and in due course obtained judgment and execution.

With all deference and respect for the finding of the learned trial Judge, I think the sale or transaction under which Gowan claims title to the hay in question was not accompanied by an immediate delivery followed by an actual and contained change of possesssion, and that it is void as against the execution creditor under The Bills of Sale and Chattel Mortgage Act: *Jackson* v. *Bank of Nova Scotia,* 9 M.R. 75; *Brown* v. *Peace,* 11 M.R. 409; *Parkes* v. *St. George,* 10 A.R. 496; *Hyman* v. *Cuthbertson,* 10 O.R. 443.

As the execution creditor succeeds on this ground it is not necessary to consider the other questions raised on the appeal.

The appeal should be allowed with costs.

Judgment in the Court below will be set aside and judgment entered for the execution creditor Conn for $25.00 and costs.

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HARGRAVE V. HART.

Before MATHERS, C.J.K.B.

Infant—Negligence—Contributory negligence.

A boy eleven years old should be deemed to be of an age to know the danger of running across a street frequented by motor cars without taking care not to run in front of an approaching car; and, if he does not take such care and is in consequence struck and injured by a car operated without negligence on the part of the driver, the latter will not be responsible in damages.

DECIDED: 25th November, 1912

Statement

THE plaintiff, Eddie Hargrave, a boy of 11 years of age, brought this action, by his father as next friend, against Hart, a chauffeur, for damages.

On April 28, 1912, while the boy was running across Maryland Street, he was knocked down and run over by an automobile driven by the defendant, in consequence of which his left leg was broken above the knee and he was bruised and injured on the head and back.

The evidence showed that the boy, with others, was playing tag on the street about 9 p.m., and started to run across the street to escape being tagged. He was nearly across the street when some of the other boys shouted that an automobile was coming, and he then turned and started to run back to the side of the street from which he had come and, in doing so, ran in front of the automobile. If he had continued straight on or had not run back he would have been all right.

G. Moody appeared for the plaintiff.

No one appeared for the defendant.

MATHERS, C.J.K.B., dismissed the action, but, under the circumstances, without costs. During the progress of the trial it was urged that the plaintiff could not be guilty of contributory negligence. His lordship made some comments on the evidence given, and stated he thought the boy was of an age to know that it was dangerous to run across a street frequented by motor cars

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without taking care not to run in front of an approaching car. The boy was of an age to appreciate the danger, and he should have looked out and taken care where he was going.

His lordship also stated that parents should take more care of their children and not allow them to run and play on the streets, in the indiscriminate manner in which some parents allow their children to do. It was unfortunate the child had suffered the injuries he had; but, as a matter of fact, it was his own fault and arose through his own recklessness or panic, and was not due to any negligence on the part of the defendant.

COONEY v. JICKLING.

Before MATHERS, C.J.K.B.

Costs—Appeal from taxation of costs—King's Bench Act, Rules 684, 968, 969—*Unnecessary proceedings.*

Under Rule 684 of the King's Bench Act, an appeal will lie from the taxation of costs between party and party as to items which have been objected to before the taxing officer, although such objections have not been put in writing and carried in before the officer as provided for in Rules 968 and 969.

When the plaintiff's claim is not contested, although at the trial he gets judgment thereon with costs and also on the defendant's counterclaim with costs, he should get no costs in respect of his claim other or greater than if he had signed judgment upon it when he might have taken that course.

DECIDED: 20th November, 1912.

Statement

APPEAL from the taxation of the taxing officer at Morden.

C. H. Locke for plaintiff.

H. E. Swift for defendant.

MATHERS, C.J.K.B. The defendants did not deny the plaintiff's claim which was for the recovery of a liquidated sum of money, but they set up a counterclaim. The plaintiff did not sign judgment upon his claim, as he

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might have done and have gone down to trial on the counterclaim alone, but he set the action down for trial on both claims. As there was no dispute as to the plaintiff's claim, the whole trial was occupied with the counterclaim. As a result, judgment was given allowing the plaintiff's claim with costs and dismissing the defendants' counterclaim with costs.

The plaintiff brought in two bills of costs, one upon the claim and another upon the counterclaim, and both bills were taxed, and the defendants appeal.

In the first place the plaintiff contends that no appeal will lie as no written objections were carried in before the taxing officer pursuant to Rules 968 and 969.

These rules correspond with Ontario Rules 1182 and 1183. Ontario Rule 774 provides that a party dissatisfied with the certificate of a taxing officer may apply to a Judge in Chambers to review the taxation as to any item or part of an item which has been objected to, as provided by Rules 1182 and 1183. The Manitoba Rule 684 was evidently copied, in part, from Ontario Rule 774, or its predecessor Rule 851; but the part thereof confining the appeal to items concerning which written objections were made has been omitted.

Manitoba Rule 684 is as follows:

"684. Any party who may be dissatisfied with the certificate of a taxing officer, as to any item or part of an item which may have been objected to, may apply to a Judge in Chambers for an order to review the taxation as to such item or part of an item, and the Judge may thereupon make such order as to the Judge may seem just."

The only limitation placed by this Rule on the right of appeal is that the item or part thereof appealed against should have been objected to before the taxing officer. This objection may be oral or in writing.

In my opinion, therefore, the carrying in of written

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objections is not a pre-requisite to the right of appeal, and the plaintiff's objection fails.

I find that a similar objection was taken in *Middleton* v. *Black* before my brother Macdonald on the 24th June last, and, after consideration, he decided the point against the objection.

The first objection is that, in the bill of costs appertaining to the plaintiff's claim, an order for production and incidental charges were taxed. This the defendants contend should not be, as the plaintiff's claim was admitted and there was no necessity for an order for production. I agree with this contention; but, as the plaintiff would have been entitled to obtain an order for production in respect of the counterclaim, and he has not charged for it in that bill, the items may be allowed.

It is next objected that two fees for advising on evidence are allowed. This is clearly wrong, as there should be no fee for advising on evidence respecting a claim concerning which there would be no evidence.

A counsel fee of $40 was also taxed for the trial of the plaintiff's claim, and also a counsel fee of $60 on the trial of the counterclaim. As the plaintiff might have signed judgment by default in respect of his own claim, no counsel fee should be taxed in respect to it.

I have spoken to Mr. Walker, the senior taxing officer, and he agrees with this; but says that, in that event, as the trial lasted one day, the counsel fee in respect of the counterclaim should be increased to $75, and I do this.

The next item is:

Instructions for brief; two instructions for brief and two briefs were taxed. This is an error, there should have been one instructions for brief and one brief.

I have revised the bill in consultation with Mr. Walker, the senior taxing officer, and he agrees with the disposition I have made of it.

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The net result is that the plaintiff's taxed bill on his claim should be reduced by $58.90, and the bill on the counterclaim should be increased by $15, making a reduction on the total of the two bills of costs of $43.90. The bills will be referred back to the taxing officer to make these deductions.

The defendants are entitled to the costs of this appeal to be taxed and set off against the plaintiff's taxed costs.

IN THE COURT OF APPEAL.

WATTS v. TOLMAN.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Usury—Right of action to recover excessive interest paid—Money Lenders Act, R.S.C. 1906, *c.* 122.

An action lies at Common Law to recover interest paid by the borrower in excess of the legal rate.

Browning v. *Morris*, (1778) 2 Cowp. 791; *Smith* v. *Bromley*, 2 Doug. 696, and *Barnhart* v. *Robertson*, (1842) 6 O.S. 542, followed.

The Money Lenders' Act, R.S.C. 1906, c. 122, though it provides a remedy for the borrower when sued by the lender of money at an excessive rate of interest, does not take away the Common Law right of the borrower to sue for excessive interest paid, such remedy being only cumulative.

DECIDED: 18th November, 1912.

Statement

APPEAL from decision of Mathers, C.J.K.B., giving judgment for the plaintiff on a demurrer to the statement of claim on the ground that the plaintiff had no cause of action.

The following judgment was delivered by

MATHERS, C.J.K.B. The defendant is a money lender residing in the City of New York in the United States, but who, during the years 1906, 1907 and 1908, carried on a money lending business in this City. During that time he loaned money to a large number of people at a

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rate of interest in excess of that permitted by section 6 of the Money Lenders' Act, c. 122, R.S.C. 1906. Twenty-six of these borrowers who paid to the defendant interest in excess of the legal rate, to the aggregate amount of $3,397.08, assigned their claims to the plaintiff, who now sues the defendant to recover the excess of interest so paid.

The defendant demurs to the whole statement of claim on the ground that the plaintiff has no right of action.

At Common Law a borrower who had paid interest in excess of the legal rate fixed by the usury laws had a right of action to recover such excess. The law was so declared by Lord Mansfield in *Browning* v. *Morris,* 2 Cowp. 791, 98 Eng. Rep. 1364. He there said: "These statutes were made to protect needy and necessitous persons from the oppression of usurers and monied men who are eager to take advantage of the distress of others, whilst they, on the other hand, from the pressure of their distress are ready to come into any terms, and with their eyes open not only to break the law but to complete their ruin. Therefore the party injured may bring an action for the excess of interest."

He reiterated that statement of the law in *Smith* v. *Bromley,* 2 Doug. 698 (note), 99 Eng. Rep. 441, where he, at the same time, disapproved of *Tomkins* v. *Bernet,* 1 Salk. 22, which appeared to have decided the contrary.

To the same effect are *Clarke* v. *Shee,* 1 Cowp. 200, and *Bosanquett* v. *Dashwood, Tempe* Talbot 38. In *Barnhart* v. *Robertson,* 6 O.S. 542, an action to recover interest paid in excess of usury laws was sustained in Ontario. See also 39 *Cyc.* 1030, and 29 *Am. & Eng. Encyc,* 543.

By section 6 of the Act a money lender is prohibited from stipulating or exacting upon a loan of money, the principal of which is under $500, a rate of interest in

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excess of twelve per cent. The loans in respect of which this action is brought were all under $500.

By section 11 every money lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or a penalty not exceeding $1,000, who lends money at a rate of interest greater than that authorized by the Act.

It was argued that section 7 provides a remedy where a suit, action or other proceeding concerning a loan of money has been brought by the money lender, but does not provide for any action at the suit of the borrower. I doubt very much if that is the correct interpretation of section 7; but I do not find it necessary to decide the point, as I am clearly of opinion that the statute does not supplant the Common Law right, but the remedy under the statute is cumulative.

The only point argued was as to whether an action lies for interest exacted in excess of the rate fixed by the Money Lenders' Act. In my opinion it does.

There will therefore be judgment on the demurrer for the plaintiff with costs.

Defendant appealed.

H. F. Tench for defendant.

J. F. Davidson for plaintiff.

THE COURT dismissed the appeal with costs.

Appeal dismissed.

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IN THE COURT OF APPEAL.

GAAR SCOTT CO. v. MITCHELL.

Before RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Contract—Sale of machinery—Agreement for lien or charge on land to secure price—Delivery—Waiver—Verbal modification of contract.

The plaintiffs agreed to sell and the defendant agreed to purchase certain machinery and accessories, and the defendant agreed to give the plaintiffs a lien or charge for the price on certain land. The plaintiffs failed to deliver three of the articles enumerated which formed an important part of the whole outfit, but the delivery of these articles was subsequently waived by the defendant on his receiving an allowance for them satisfactory to him.

Held, that there was not here a substitution of a mere verbal contract for the original written agreement, but only a modification of one part of it, to which modification the defendant was a consenting party, and that the plaintiffs were entitled to judgment for the balance of the original debt and a lien or charge on the lands referred to and a sale of the defendant's interest therein, to realize the amount of the debt and costs.

Rustin v. *Fairchild*, (1907) 39 S.C. R. 274, distinguished.

DECIDED: 21st October, 1912.

Statement

ON the 28th July, 1906, the defendant, by an agreement in writing, agreed to buy from the plaintiffs, and the plaintiffs agreed to sell to the defendant, certain machinery in the agreement fully described, for the price of $3700, payable in instalments as in the agreement set forth, and the defendant further agreed to collaterally secure the payments by making his promissory notes in favor of the plaintiffs for the sums payable.

The machinery was delivered to, and accepted by, the defendant, who gave his promissory notes as agreed and paid four of the notes, amounting to one half the purchase price of the machinery.

The agreement provided that, in default of payment of the purchase price and obligations in full as they respectively matured, the vendor might resume possession of the machinery, and empowered the vendors to sell the machinery, or any part thereof, on account of the purchaser, by public auction or private sale, crediting the net proceeds of

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such re-sale, after deducting all expenses in resuming possession, etc., and the purchaser should remain liable for the balance of such purchase money and interest on all obligations given therefor.

The defendant, for the purpose of further securing to the plaintiffs the payment of the purchase price, created a charge or lien upon the north-east quarter of section fourteen (14) in township thirty-seven (37) in range twenty-seven (27) West of the Principal Meridian in Manitoba, for the sum of three thousand seven hundred dollars.

The defendants made default in payment of the two final instalments of purchase money represented by the two promissory notes sued on, with the exception of two hundred dollars paid on the note in the statement of claim firstly mentioned.

The plaintiffs further alleged that they had endeavored to resume possession of the machinery pursuant to the provisions of the agreement, but that the defendant had refused to allow the plaintiffs to resume possession of the same.

In the statement of defence it was alleged that the plaintiffs did not deliver to the defendant certain articles part of the machinery agreed to be sold, and it appeared from the evidence that there were several articles omitted, but the plaintiffs contended that this and other differences were settled before this action was brought, so that the defendant did not rely or insist upon that fact as a defence or abatement of purchase price or otherwise.

The defendant further alleged that the plaintiffs had resumed possession and taken from the defendant the machinery in question and claimed that by reason thereof he had been released from all liability under the agreement and promissory notes referred to in the statement of claim.

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The case was heard by Macdonald, J., who gave judgment for the plaintiffs for the amount sued for, together with costs, and a charge or lien upon the lands described in the statement of claim and decreed a sale of the defendant's interest in the lands in question.

Defendant appealed.

E. L. Howell for defendant cited *Fairchild* v. *Rustin,* 17 M.R. 194; 39 S.C.R. 274.

D. A. Stacpoole and *L. J. Elliott* for plaintiffs, respondents, cited *Abell* v. *McGuire,* 13 M.R. 454; *White* v. *Beeton,* 30 L.J.Ex. 376, and *Cowan* v. *Fisher,* 31 O.R. 426.

PERDUE J.A. The plaintiffs, who are a manufacturing company, sue the defendant on an agreement in writing made by him to purchase a threshing outfit from them. They seek to recover the balance of the purchase price and to enforce a lien for the amount against the defendant's land. This outfit consisted of a traction engine and separator, and a number of attachments and appliances to be used in connection with them, all of these being enumerated in the agreement. The defendant claims that three of the articles forming an essential part of the outfit as ordered were not delivered to him, that the plaintiffs have consequently failed in proving that they performed their part of the agreement and that therefore the plaintiffs are not entitled to enforce the lien.

The agreement contained a provision that the defendant would give the plaintiffs a mortgage on his land at the time of the delivery of the machinery, or thereafter on demand, for the purpose of securing payment of the purchase money. It is shown that three of the articles forming part of the outfit purchased, namely, one cab for engine, two side curtains and two end curtains, were not delivered in accordance with the agreement. The plaintiffs failed to deliver the cab and the end curtains. Side curtains were delivered, but these were incomplete. If

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the case ended there, the principle enunciated in the case of *Rustin* v. *Fairchild,* 39 S.C.R. 274, would apply, and the provision as to the mortgage would only become operative upon a complete delivery being made pursuant to the contract. The subsequent actions of the parties, however, put an entirely different aspect on the case, one which completely distinguishes it from *Rustin* v. *Fairchild.*

The agreement for purchase was dated 28th July, 1906. Delivery of the machinery, with the exception of the above three articles, was made on or about 9th September, 1906, and was accepted by the defendant. An arrangement was made between the parties by which the defendant received a satisfactory allowance for the missing parts. At, or just before, the receipt of the machinery the defendant signed promissory notes payable at the times and for the sums stated in the agreement, and comprising in the aggregate the whole amount of the purchase money. He also, at the same time, executed a specific lien under his hand and seal whereby he created a charge upon his land for the purchase money, payable in the same manner as the notes. The notes and lien were dated 6th September, 1906. The defendant made several payments on account, but a large portion of the purchase money remained due and unpaid when the action was commenced.

It is clear that the principle set out in *Rustin v. Fairchild* does not apply in the present case. Delivery of the missing articles was waived by the defendant for a consideration that was satisfactory to him, with the effect of modifying the agreement accordingly. He accepted the machinery and gave notes and a lien on his land to secure the purchase money due under this modified agreement. He retained the machinery for several years and made payments on account. There was ample consideration for the making of the promissory notes and for the giving of the lien upon the land.

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PERDUE, J.A.

The judgment was properly entered for the balance due upon the notes and the plaintiffs are also entitled to have the lien enforced against the defendant's land, as directed by the judgment pronounced at the trial of the action.

The appeal should be dismissed with costs.

CAMERON, J. A. This action was tried before Mr. Justice Macdonald, who gave a written judgment setting forth the facts, and directed a verdict to be entered for the plaintiff. The action was brought to recover amounts claimed to be due by the defendant to plaintiff on an agreement to purchase certain machinery and also to declare the plaintiff entitled to a lien alleged to have been created by the defendant to secure these amounts.

The defendant appeals from this judgment in one particular only, viz.; that portion of it declaring the plaintiff entitled to a lien. It is alleged for the defendant that certain articles specified in the agreement were not furnished the defendant, that certain other articles were substituted for these, that the effect was to substitute a new verbal agreement for the original written agreement and that, therefore, the original agreement having ceased to exist, there remained for the plaintiff its claim for money only, but no enforceable claim for a lien.

We were specially referred to the case of *Fairchild* v. *Rustin*, 39 S.C.R. 274, wherein the agreement in question was similar to that set up here. The question before the Supreme Court was whether the right of the respondents (the Company) to enforce the lien stipulated in the contract sued on still existed. As I understand it, the judgment of the Supreme Court was that the delivery of all the machinery contracted to be delivered to the purchaser by the Company was, under the contract regarded as a whole, a condition precedent to the creation of a lien by the purchaser upon his property for the amount of the purchase money, that this condition was not per-

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formed by the Company and that, therefore, the lien did not arise. "I am of the opinion that the said provision (*i.e.* as to the lien on the lands), will only become operative in the case of a complete delivery pursuant to such a bargain," per Idington, J., at p. 277. Now, if we take it that the condition here had precisely the effect of that in the *Fairchild* v. *Rustin* case, it is plain on the evidence that the defendant by his actions waived the performance of that condition. I can arrive at no other conclusion. That seems to me a sufficient answer to this contention.

In my view there was not here a substitution of a new verbal contract for the original written agreement. It was rather a modification of one part of the original agreement to which modification the defendant was an assenting party. The parties had this intention and no other.

I have read Mr. Justice Perdue's judgment, and agree that the appeal must be dismissed.

RICHARDS, J. A., and HAGGART, J. A., concurred.

Appeal dismissed.

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IN THE COURT OF APPEAL.

HAM v. CANADIAN NORTHERN RY. CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Damages for injury caused by shock—Neurasthenia following physical and mental shock—Interest.

Plaintiff, while travelling on a street car with which one of the defendants' engines collided, was thrown with the car down an embankment. His physical injuries, so far as they could be seen, were slight, but the mental shock he received was very serious and a condition of acute neurasthenia and insomnia followed and continued up to the time of the trial, incapacitating him from doing any work and causing great suffering. Negligence on the part of the defendants was admitted.

Held, that the plaintiff was entitled to recover substantial damages in respect of the disease from which he was suffering as the shock which brought it on was both physical and mental.

Victorian Railway Commissioners v. *Coultas*, (1888) 13 A.C. 222; *Geiger* v. *G. T. R.* (1905) 10 O.L.R. 511, and *Henderson* v. *Canada Atlantic Ry. Co.*, (1898) 25 A.R. 437, distinguished.

Interest on the amount awarded as damages in such a case should not be allowed for the time between the accident and the verdict.

DECIDED: 11th October, 1912.

Statement

THE plaintiff alleged that he received personal injuries as a result of the defendants' negligence in running one of their trains, and claimed $10,000.

The particulars filed of the injuries, besides stating that the plaintiff was bruised and shocked, set out further that "since the date of the accident the plaintiff had been a nervous wreck, suffering from traumatic neurasthenia, being unable to sleep at night, and being unable to carry on any business or do any work."

The defendants, by their statement of defence and admissions filed later, took the position that, while they were negligent as alleged, such negligence did not occasion the plaintiff any bodily injury and that, as to the nervous injury complained of, they were not liable at law for the same.

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PRENDERGAST, J.

The following judgment at the trial was delivered by

PRENDERGAST, J. On the day of the accident the plaintiff was seated to the right at the rear end of an open trailer propelled by a motor car of the Winnipeg Electric Railway Company moving southward on that company's tracks on Pembina Street, when, having reached the intersection of Rosser Avenue, which is a point where the street railway track is diagonally crossed by a line of the defendants, a train of the latter moving westward at a rate of 15 to 20 miles an hour ran into the said street railway motor car,—the circumstances of the accident being such (as admitted by the defendants) as to constitute negligence on their part. A subway was then being excavated at that place for the purpose of allowing the street railway to run underneath Rosser Avenue and the Canadian Northern Railway line; but, at the time, the street railway track, which had been deflected pending the prosecution of the work, was kept on the street level along and quite close to the east edge of the excavation which was at that point about 14 feet deep. The sides of this excavation were cut almost perpendicularly, but were supported by timbers set at an angle of about thirty-five degrees to prevent in the meantime the earth from caving in.

By the force of the collision the street railway motor car, which was struck square, was wrenched from the trailer, carried some distance forward of the engine and crushed to pieces,—which resulted in the loss of one life and injuries to others; while the trailer, receiving the impact at its forward end where it was coupled to the motor car, was swerved around on its hind wheels and fell or slid head-first along the timbers to the bottom of the excavation, where it remained rear end upwards and in a practically vertical position, except for the incline of the timbers.

The plaintiff, who, as stated, was to the right on the

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last seat of the open trailer, says that the last he remembers before the collision is that he was watching a pile driver working down in the subway, and that the first that he realized after this was that he was at the bottom of the excavation. He must have been thrown out of his seat to the right by the swerving of the trailer and then have fallen or slid down along the car and timbers to the bottom. The length of the car was given as 24 or 26 feet, but the plaintiff says that his fall was about 20 feet. It does not appear how many passengers were with the plaintiff on the trailer, but he says that the conductor and a boy were also hurt.

The plaintiff at all events got on his feet, called out, looked up and saw the train. He says he felt all shaken up, sore and nervous, and that it had kind of knocked the senses out of him. He, however, crawled up the bank along the side of the trailer, looked around and realized the nature and extent of the accident. The motor car was all smashed by the defendants' train. There was the dead body of a lady wedged in under the pony trucks of the engine, and a man very seriously injured was lying in the debris. The plaintiff apparently looked on this scene for an hour or three-quarters of an hour; then he took a street car and went to his home which was less than a mile further south.

After arriving home, the plaintiff had supper with his wife and related to her the circumstances of the collision, but does not seem to have complained of any special injury except that he had been shaken up. In the evening, upon retiring, he realized that there was an abrasion on his right leg and a sore spot on his head; but these were the only marks or visible wounds if they may be so called, and the evidence shows that they were of no gravity whatsoever in themselves.

The plaintiff says that he had but little sleep that first night, and still less the following; that he felt more

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and more uneasy and nervous; that, on the third day, twitching and shooting pains down his back became so violent that he went to consult a medical practitioner (Dr. Clark); that, notwithstanding medical aid, he steadily grew worse; that he lost 40 lbs. of flesh and grew weaker every day; that he suffered from insomnia and impaired memory; that he became unable to exert himself physically; that his walking has become so uncertain that he has to use a cane; that he is unable to work at his trade, which is that of a printer, as he cannot raise his hands without starting violent pains down his spine.

At the time of the trial, which was about six months after the accident, he was still under treatment of Dr. Clark who had then attended on him forty or fifty times. Two months after the accident, he was also examined by Dr. Lehmann acting under instructions from the defendants, and, a few days before trial, by Dr. Stevenson, at his own request. These three medical practitioners gave evidence at the trial, being called by the plaintiff. No evidence was tendered for the defendants.

The plaintiff's contention is that he suffers from traumatic neurasthenia—that is, neurasthenia caused by shock either purely mental or both physical and mental.

I think the plaintiff has fully established that he suffers from that form of disease, whatever may be said later as to whether the shock that caused it was purely mental or both physical and mental.

Of course, as shown in evidence, where there are no visible wounds or apparent lesions of tissue, or practically none as in this case, the medical practitioner must depend very largely, and at times almost wholly, upon the patient's history of the case for his diagnosis of the disease.

The defendants contend in this respect that the plaintiff has been malingering, and that all that he says of his

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condition and its connection with the accident is invention on his part. But the medical evidence establishes that, although there are certain objective symptoms of the disease which can be simulated, there are others that cannot, to the eye of the experienced practitioner. Among the latter is the neurasthenic tremor, quite distinguishable from the alcoholic tremor which the defendants say the plaintiff may have been suffering from. There are also the exaggerated reflexes which lack the usual response and spontaneity when shammed, and the characteristic appearance resulting from the general condition. The plaintiff exhibited all those essential and unmistakable symptoms, besides others less conclusive, especially when taken singly but also very material as a whole.

Dr. Clark, who saw him forty or fifty times as stated, says that he watched him very closely, and that he is convinced that the symptoms could not be simulated. And Dr. Lehmann says, not only that he suffers from neurasthenia, but also that he is rather a severe type and a marked case of this ailment.

I find then that the plaintiff suffers from neurasthenia caused by shock; and, from the plaintiff's uncontradicted evidence of the collision and his falling down the subway, and that of Dr. Clark showing his condition three days after, together with the defendant's admissions as far as they go, the conclusion is unavoidably reached that the disease was the direct result of the accident.

The defendants urge further that, as the only visible physical injuries (abrasion of the leg and swollen spot on the head) were altogether insignificant, the shock which caused the neurasthenic condition was purely mental as more probably brought on by fright and the horror of the scene of destruction near which he stayed for three-quarters of an hour after the accident, and that the plaintiff cannot recover in law for injuries resulting from a purely mental shock.

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The defendants rely as to this upon *Victorian Railways Commissioners* v. *Coultas*, 13 A.C. 222, heard by the Privy Council, and which seems to support the proposition. This case has been the subject of considerable, and generally unfavorable, comment. It is reviewed at length in *Bevan on Negligence*, 2nd ed. 67. In *Dulieu* v. *White*, [1901] 2 K.B. 669, the Court refused to follow it; and in *Pugh* v. *London B. & S.C.Ry.*, [1896] 2 Q.B. 248, and *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, it is clear that the Court, although basing its judgments on distinctions, discountenances the decision. It was also disapproved in the Irish case of *Bell* v. *G.N.R.*, 26 L.R. Ir. 428. In Canada it has generally been considered binding, as in *Geiger* v. *G.T.R.*, 10 O.L.R. 511, and *Henderson* v. *Canada Atlantic*, 25 A.R. 437, and I should equally feel bound by that decision of the highest Court of Appeal for this country.

This is, however, not material in my opinion. The proposition of law there stated does not seem to me to have any application in the present case, as the expert evidence is to the effect that, although the visible wounds or injuries were insignificant in themselves, still the shock which caused the neurasthenic condition was not only mental but also physical. I have detailed at length the circumstances of the accident: the collision of the engine with the motor car, the swerving of the latter, its being precipitated down the embankment and the plaintiff's fall to the bottom of the subway. It is plain that, in such circumstances, the violence of the physical shock cannot be measured alone by the gravity or insignificance of the superficial marks or abrasions. At all events, with what personal knowledge they had from attending and observing the plaintiff, and the circumstances of the accident being fully laid before them, the three medical experts (one of whom examined the plaintiff on the defendants' behalf, although appearing as a witness for

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the plaintiff) all give it as their opinion that the shock which caused the diseased condition was both physical and mental, and beyond this I do not see that it is necessary or incumbent for me to go.

The plaintiff should then recover.

He is fifty years old, and his health was apparently good before the accident. He is a printer. He says he has of late years been earning about $85 a month, but there is evidence that his habits as a bread-earner have not been steady. One doctor said that his condition has not improved during the six months that elapsed between the accident and the trial, although it has not become worse; and another doctor said that, while he is rather a severe type of traumatic neurasthenia, still in favorable surroundings, that is with rest, his nervous system would likely recuperate. There is also the cost of medical attendance to be taken into account.

On the whole, I would fix the damages at $2,000, for which there will be judgment for plaintiff, with interest since July 8th, 1910, and costs.

Defendants appealed.

O. H. Clark, K.C., for the defendants, appellants, cited *Toms* v. *Toronto St. Ry. Co.*, 22 O.L.R. 204, 210, affirmed 44 S.C.R. 268, 281; *Victorian Railway Commissioners* v. *Coultas*, 13 A.C. 222; *Henderson* v. *Canada Atlantic Ry. Co.*, 25 A.R., 437 and *Geiger* v. *G.T.R.*, 10 O.L.R. 511.

P. C. Locke for plaintiff, respondent, abandoned interest on the verdict.

THE COURT reduced the verdict to $2,000, and in other respects dismissed the appeal.

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INKSTER V. MUNICIPALITY OF MINITONKA.

Before MATHERS, C.J.K.B.

Public Schools Act, R.S.M. 1902, *c.* 148, *s.* 2 (*m*), *s.* 48 (*n*)—*Non-resident pupils, payment of fees by.*

Under sub-section (*m*) of section 2 of The Public Schools Act, R.S.M. 1902, c. 148, as re-enacted by 2 Geo. V. c. 65, s. 2, the children of parents who have their permanent and principal places of residence within a school district cannot be said to be "non-resident pupils," although the parents neither pay nor are liable to pay a school tax in such district equal to the average school tax paid by the actual tax-payers of such district. Consequently the trustees of the school district cannot, under sub-section (*m*) of section 48 of the Act, collect any fees for the attendance of such children or exclude them from the school in default of paying fees.

DCIDED: 2nd October, 1912.

Statement

THIS action was brought for an injunction to restrain the defendants from excluding the children of the plaintiff from attending school, in default of paying a fee of 50 cents per month each.

W. J. Cooper, K.C., and *A. Meighen* for plaintiff.

A. C. Williams and *D. M. Ormond* for defendants.

MATHERS, C.J. K.B. The facts in this case were admitted. The plaintiff and his children have their permanent and principal place of residence in the district, but he neither pays nor is liable to pay a school tax equal to the average school tax paid by the actual tax-payers of the district. The contention of the school trustees is that the plaintiff's children are non-resident pupils as that expression is defined by The Public Schools Act.

By sub-section (*n*) of section 48 of the Public Schools Act, R.S.M. 1902, c. 148, the trustees have a discretion to collect a fee not exceeding $1.00 per month for each "non-resident pupil" and from pupils whose parents reside on land exempt from taxation.

Sub-section (*m*) of section 2, as re-enacted by section 2 of c. 65, 2 Geo. V., says:

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"The expression 'non-resident pupils' includes all pupils, except where the parents, or one of them, or the legal guardian, or guardians of such pupils have or has their or his permanent and principal place of residence in such school district, and except when such pupils or their father or mother or legal guardian, whether resident in the said district or not, pays or is liable to pay a school tax in such district at least equal to the average school tax paid by the actual tax-payers of such district."

By the plain reading of the section all pupils are to be regarded as non-resident, with the exception of two classes; first, those whose parents, or one of them, or whose legal guardian has his permanent and principal place of residence in the district; and secondly, those who, or whose parents or legal guardians, pay or are liable to pay the average school tax, whether they reside in or out of the district. Those who come within either exception are not to be classed as non-residents. The plaintiff's children come within the first exception and therefore the trustees have no right to insist on payment of a fee as a condition of their being allowed to attend the school.

A mandamus will go compelling the defendants to permit the plaintiff's children to attend school without payment of a fee, and an injunction to restrain them from preventing the children from so attending.

The plaintiff is entitled to the costs of the action.

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HOUGHTON V. NICOLL.

Before MATHERS, C.J.K.B.

Vendor and purchaser—Cancellation of agreement of sale for default in payment—Forfeiture of money paid—Acceleration clause in agreement.

A provision in an agreement of sale of land that, in the event of default being made in payment of any one of the instalments of principal stipulated for or of any interest, taxes or premiums of insurance or any part thereof, the whole purchase money shall immediately become due and payable, is one against which the Court can give no relief; and, upon any such default being made, the vendor is entitled to judgment for the full amount of the unpaid purchase money and, if the agreement so provides, for cancellation of the agreement and forfeiture of all payments made thereunder and of all improvements made by the purchaser on the land, in case payment of the unpaid balance of principal, interest and costs be not made within a time to be fixed by the Master.

Vosper v. *Aubert*, (1908) 18 M.R. 17; *Wallingford* v. *Mutual*, (1880) 5 A.C. at p. 705, and *McFadden* v. *Brandon*, (1904) 8 O.L.R. 610, followed.

DECIDED: 2nd October, 1912.

ACTION by vendor against purchaser of land for the purchase money and, in default of payment, cancellation of the agreement and forfeiture of the moneys already paid thereunder. Statement

A. E. Hoskin, K.C., and *P. J. Montague* for plaintiff.

A. B. Hudson and *E. A. Deacon* for defendant.

MATHERS, C.J.K.B. The agreement in question in this suit is dated the 12th day of April, 1911, and the whole consideration is $58,834.25. Of this sum $16,152.31 was paid in cash, and the balance was to fall due as follows: $14,227.31 on the 12th day of April, 1912, and a like amount on the 12th of April in each of the years 1913 and 1914. The purchaser did not make the payment which fell due on the 12th day of April, 1912.

The agreement provides that, in the event of default being made in payment of principal, interest, taxes or premiums of insurance or any part thereof, the whole

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purchase money shall become due and payable. Under that provision the plaintiffs now sue for the recovery of the whole balance payable under the agreement, amounting to $45,242.86, together with interest at 6 per cent. from the 12th day of April, 1912, to the date of payment.

Such cases as *Vosper* v. *Aubert,* 18 M.R. 17; *Wallingford* v. *Mutual,* 5 A.C. 685, and *McFadden* v. *Brandon,* 8 O.L.R. 610, make it clear that an acceleration clause of this kind cannot be relieved against.

The plaintiffs are, therefore, entitled to judgment for the amount claimed and interest thereon from the 12th April, 1912, to judgment at 6 per cent.

They are also entitled to have a time fixed within which the defendant must pay the unpaid balance of principal and interest and costs and, in default, to a declaration that the agreement has been forfeited and is null and void and at an end, and that all payments made thereunder and improvements on the land are the property of the plaintiffs; for which purpose there will be a reference to the Master.

The plaintiffs are entitled to the costs of the action.

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PHILLIPS v. SUTHERLAND.

Before MACDONALD, J.

Infant—Repudiation of contract made by—Repayment of money received under voidable contract—Non-suit, effect of.

An infant who has made a sale of real property, and afterwards during infancy repudiated the contract, may after attaining majority maintain an action to cancel the contract, although such action is not brought immediately; provided that he has done nothing since attaining full age to avoid the previous avoidance; but in order to succeed in the action he should return any money received from the purchaser.

If, in such a case, the money is not paid back or offered, the plaintiff should be non-suited with a direction, however, that the non-suit should not have the same effect as a verdict on the merits for the defendant.

DECIDED: 16th November, 1910.

Statement

THE plaintiff, as a half-breed child of the head of a family, became entitled to a grant of 240 acres of land under the provisions of the Dominion Lands Act, R.S.C. 1906, c. 55, and in the month of August, 1901, a certificate issued showing that she was so entitled.

The plaintiff was at the time an infant under the age of eighteen years.

The defendant made a business of purchasing the interests of half breeds in lands thus allotted to them and claimed to have purchased the interest of the plaintiff in the lands to which she became entitled and to have obtained possession of the plaintiff's certificate as a result of such purchase.

After she attained full age she made a demand for the scrip and brought this action to recover possession, claiming the same as wrongfully and unlawfully detained by the defendant, and that she objected to the sale and would not and did not accept the money.

H. A. Robson, K.C., and *S. R. Laidlaw* for plaintiff.

C. P. Wilson, K.C., and *W. C. Hamilton* for defendant.

MACDONALD, J. The sale was made by the father of

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the plaintiff at the office of the defendant in Killarney. The defendant positively asserts that only the plaintiff, her father and himself were present, that he purchased the interest of the plaintiff for $260, paying $200 down, the balance to be paid when the land was selected, and that the plaintiff received the money. The plaintiff, on the other hand, swears that she objected to the sale and would not and did not accept the money and, notwithstanding such objection, that the defendant handed the money to her father and received her certificate. She further swears that her brother Joseph was present and that he at the same time disposed of his land to the defendant and handed him his certificate, and in this she is corroborated by her brother Joseph, who says he was present and that he heard the plaintiff object to the sale. He, however, says he disposed of his interest to the defendant in September, 1901. It is possible, however, that there may be an honest confusion in dates. The defendant paid Joseph at the time of the disposal to him of the latter's interest the sum of $210, and paid the plaintiff the sum of $200, the cheques and notes (Ex. 8 and 9) of date the 25th November, 1901, correspond with the amounts paid to the plaintiff and her brother Joseph. The defendant's memorandum book (Ex. 7) would also indicate that the two transactions took place at the same time, namely, on the 25th November.

The plaintiff says she objected to the disposal of her interests and that she refused the money when offered her. The father, however, she says, did receive it and carried it away with him. The defendant is a man of business and it seems almost incredible that he would pay over this money to the father in the face of the opposition of the plaintiff, upon whom he knew he must rely for the completion of the bargain by the selection of the land to which she became entitled. She had told her brother Michael that she intended to sell to the defendant. She left her

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home with her father for the express purpose of disposing of her scrip, and it seems to me reasonable, considering the class of people these were, and the sales by her father and brothers, that she was a willing party to the sale, and that there was no objection raised by her. The money was paid over by the defendant to either the plaintiff or her father, it matters not which; the plaintiff received the benefit of a portion, if not all of it, and I am convinced that the money deposited by her in Shultz' bank was part of this money, notwithstanding the conflicting evidence as to dates, and the attempted explanation of where this money came from. Her brother Michael says that the plaintiff bought cattle in January, 1902, and paid $50, that she told him so and also told him that she had money deposited with Mr. Schultz, the banker at Baldur.

I find that the plaintiff's father, in her presence and without objection, did sell her scrip to the defendant and that he became lawfully entitled to the possession of it. The plaintiff was, however, an infant under the age of eighteen, and any dealing with her scrip could, on her attaining her majority, be repudiated. Even if over the age of eighteen and under twenty-one, she could not dispose of her interests without having been examined as provided by section 16 of The Half Breeds Act showing such child's free and voluntary consent to sell, and it is contended on her behalf that the evidence of infancy being clearly established the finding must be in favor of the plaintiff.

The plaintiff must, in my opinion, succeed or fail on the one ground—that of infancy, and this is the principal ground suggested by plaintiff's counsel in support of his right to succeed.

The contention of counsel for the defendant is that, if the infant does not avoid the contract within a reasonable time after attaining full age, the fact of such non-avoidance shall be treated as a ratification.

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The plaintiff attained full age on the 8th November, 1906, and did not make demand for the scrip until 6th January, 1908, and on the 8th April, 1908, brought her action to recover possession of the said scrip, claiming that the same is wrongfully and unlawfully detained by the defendant. She says that the defendant called at her home in the summer of 1904, a short time after her father's death, and wanted her to execute some papers and her mother to certify that she was eighteen years of age. In this she is corroborated by her brother Joseph. The defendant himself admits having gone there, but says it was to secure the mother's signature to some legal documents connected with the guardianship of the plaintiff, but there is no evidence that such papers were signed and, whatever was demanded, it would seem clear that a refusal was given. The defendant then, I am satisfied, knew that the plaintiff had taken a stand against his rights to the scrip in question and this, no doubt, accounts for the fact that he took no further steps to secure the plaintiff's interests.

The plaintiff, I find, repudiated, during her infancy, and there has been nothing done by her since attaining full age to avoid her previous avoidance.

She, however, received the greater portion of the purchase price for the scrip agreed upon between her father and the defendant and she would be entitled to recover in this action only on returning him the money so paid by him. She has not done so, nor offered to do so, and, until this is done, she is not entitled to succeed.

There will be a judgment of non-suit, with costs to the defendant, which I direct shall not have the same effect as a judgment upon the merits for the defendant.

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LAMONTAGNE v. WOODLANDS.

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Before MATHERS, C.J. K.B.

Municipality—Drainage—Municipal Act, R.S.M., 1902, c. 116 s. 516—*Improper exercise of statutory powers—Turning ditch into ravine not a natural water course—Damages.*

1. A municipality authorized under the Municipal Act to construct a ditch through another municipality will be liable to the owner of adjoining land for injury caused to the land by turning the ditch into a ravine which is not a natural water course and excavating in the ravine so as to enable it to carry off the water to a river, when it might have continued the ditch to the river without making use of the ravine, but will not be liable for damages caused by the construction of the ditch itself along the edge of a public highway. Discussion of the proper measure of damages to be allowed to the plaintiffs in consequence of the ravine having been rendered impassable by the defendants' works.

DECIDED: 24th July, 1912.

THE plaintiffs brought this action to recover damages for trespass in the defendants constructing a ditch across the plaintiff's land. Statement

M. G. Macneil and *B. L. Deacon* for plaintiff.

J. B. Coyne and *A. C. Campbell* for defendants.

MATHERS, C.J.K.B. In the fall of 1908 the defendant Municipality constructed a ditch from near Marquette station on the Canadian Pacific Railway so as to drain the water from certain sloughs in that municipality into the Assiniboine River. To reach the Assiniboine it was necessary that the ditch should pass through the Municipality of St. Francois Xavier. Provision for such a contingency is made by section 516 of the Municipal Act. The defendants complied with the provisions of this section and obtained the authority of the Municipal Commissioner for the construction of this ditch through the Municipality of St. Francois Xavier.

In 1901 the latter municipality had opened a highway between lots 205 and 206 of the Parish of Baie St. Paul, 66 feet wide, of which 33 feet was taken from each lot. This public highway extended from the main highway

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between Winnipeg and Portage la Prairie to the road allowance at the rear of the river lots.

In 1905 this road was graded to a point a short distance from the rear of the river lots. It was there deflected in a north-westerly direction across lot 205 so as to meet the main road to Marquette station, thus cutting off a triangular portion from the north end of lot 205. The work of grading this road was performed by the Municipality of St. Francois Xavier.

The plaintiffs owned the eastern 6 chains of lot 205. Before constructing this cut-off an arrangement was made with the plaintiffs for the sale of a strip 66 feet wide to the Municipality for the sum of $40. At that time the plaintiffs had not a title to the land, and payment of the purchase price was deferred until title should be acquired.

The Municipality at once took possession of the land thus agreed to be sold and constructed the grade across it. From that time until the present this road has constituted the main highway from the Portage road to Marquette station.

The ditch constructed by the defendant Municipality in 1908 followed the western side of this highway to a point a short distance north of the Portage road. At this point there is a ravine which runs in a westerly direction from this road across the plaintiff's land onto the adjoining land to the west, crosses under the Portage road and then turns eastward and empties into the Assiniboine River on the plaintiffs' land. The defendants turned their ditch into this ravine and as it was not sufficiently deep they entered on the plaintiffs' land and excavated with teams and scrapers in the ravine across the plaintiffs' land.

The plaintiffs complain in this action of several trespasses. Firstly, in constructing the ditch along the south side of the cut-off before spoken of; secondly, in constructing the ditch along the highway between lots 205

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and 206; thirdly, in entering upon the plaintiffs' land and excavating through the ravine. The plaintiffs claim to be damaged in several ways by these trespasses. First, about two acres of their land is severed from the balance by the ditch along the cut-off which is so deep and wide that they are unable to cross; secondly, the waters coming down the ditch have eaten into the plaintiffs' land along the west side, causing the banks to cave in and their fences in some parts to fall into the ditch; thirdly, at a low point some distance north of the ravine, it is said that the ditch, during the spring freshets and during heavy rains, overflows its banks and the waters back up onto and cover a large portion of the plaintiffs' land, and that, when the waters in the ditch have fallen and these waters are receding from the plaintiffs' land, they have cut a trench of considerable dimensions back into the plaintiffs' land; fourthly, that the excavation in the ravine and the quantity of water brought into it makes it impossible now for the plaintiffs to cross the ravine north of the Portage road with waggons and teams as they had formerly been able to do; fifthly, that for the same reason they are unable to cross the ravine south of the Portage road, that their houses and buildings are on the south side of the ravine and that in order to reach the Portage road they have now to go upon their neighbors' land and reach it in that way; and, sixthly, that at the mouth of the ravine the rush of water has worn away the land so as to form a large excavation 12 or 15 feet deep and 20 or 30 feet across.

In the first place I find that the plaintiffs had agreed to sell the land required for the cut-off to the Municipality of St. Francois Xavier, and that such Municipality entered upon it and constructed the road across this cut-off pursuant to that agreement. I find also that the land between Lots 205 and 206 was duly opened by by-law of the Municipality of St. Francois Xavier, and that since

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1905 it and the cut-off have been graded and constantly used as a highway, with the entire consent of the plaintiffs, and that the same then became and has since continued to be a regularly constituted public highway.

I find that the ditch along the cut-off is such as to prevent the plaintiffs crossing without a bridge; but, as it is not alleged that the ditch was negligently constructed at that point, and as the defendants were properly authorized to do it, the plaintiffs are entitled to no damage in this form of action because of this work.

I find that the plaintiffs' land along the side of the ditch between 205 and 206 has been worn away by the action of the water in the ditch at some places to the extent of 2 feet, and that their fence has in some places fallen into the ditch by the action of the water.

I find that, at a low point north of the ravine, the ditch did overflow and back up onto the plaintiffs' land; but I cannot find that the wearing away of the land at this point was due to the receding of the water which overflowed the ditch. It is shown by the evidence that there is a runway from the north-west that enters and crosses the plaintiffs' land at this point, and that large quantities of water come down this runway and enter the ditch at the point in question. I think it much more probable that the wearing away of the plaintiffs' land was due to the action of this water than to the water that had overflowed from the ditch.

I find that the plaintiffs' land is, on the whole, rendered drier and better for cultivation by the construction of this ditch than it was before the ditch was constructed, and in that respect the construction of the ditch has been beneficial.

I find that, in entering upon and excavating in the ravine, the defendants were trespassers and that by such trespass they have made it impossible for the plaintiffs

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now to cross the ravine north of the Portage road with teams and vehicles as they formerly could.

I find that a large quantity of additional water now passes through the ravine to what formerly passed, and that this additional quantity of water has caused a more rapid erosion of the land at the mouth of the ravine, and also keeps it wet and impassable between the plaintiffs' house and the road for a much longer period of the year than was formerly the case.

It was contended on behalf of the defendants that this ravine is a natural water course and, therefore, that the defendants had a right to terminate their ditch there and turn the waters which the ditch was constructed to carry into this ravine. I cannot agree with this contention. I find that this ravine was not a natural water course, and that the defendants had no right to turn the waters of this ditch into it. The original plan of this ditch did not terminate at the ravine, and there was no engineering difficulty in carrying the ditch on to the Assiniboine River. It was suggested by one engineer who gave evidence that the fall would be so great at the Assiniboine River that the banks would be largely cut away. That is the only reason assigned for turning the waters into the ravine and it, of course, can in no way justify the defendants in running the waters over the plaintiffs' land in what is not a natural water course.

For the damage caused by the excavation in the ravine and by the pouring of the additional quantity of water into it by this ditch, and for the damage to his fence and land along the margin of the ditch from the cut-off to the ravine, I find that the plaintiffs are entitled to compensation. For the flooding of their lands and for their inability to cross the ditch at the cut-off, I find they are not entitled to damages.

It was suggested that the measure of damage would

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be the cost of a bridge over the ravine between the house and the road and the cost of a bridge over the ravine north of the Portage road. The plaintiffs are not entitled to be placed in a better position than they were before the committing of the trespasses complained of, and the construction of bridges such as the plaintiffs suggest would provide means of crossing very much superior to the means of crossing which the plaintiffs had before the ditch was constructed. Taking all these matters into consideration, and sitting as a jury, I assess the plaintiffs' damages at the sum of $600.

There will be a verdict for the plaintiffs for $600 and the costs of suit.

The costs of the day allowed to the plaintiffs upon an adjournment at the defendants' request are allowed in addition to the ordinary costs of suit and are to be taxed to them without regard to the limitation fixed by statute.

BRANDON ELECTRIC LIGHT CO. v. CITY OF BRANDON.

Before MATHERS, C.J., K.B.

Damages—Unlawful taking of City water without payment and unknown to the City—Settlement of claim on discovery of facts—Fraud—Duress—Undue influence—Omnia præsumuntur contra spoliatorem—Waiver of right to rescind contract—Rescission—Contract—Formal acceptance of settlement by Council of City.

The plaintiff company had for years deliberately appropriated water from the defendants' system, without payment and without the knowledge of the defendants, by means of a concealed pipe connected below the City's meter. On defendants discovering the matter and demanding payment for the water of the sum of $13,778, calculated as for the full flow of the pipe during the whole period, but only at the special manufacturers' rate which the company paid for its metered water, the plaintiffs' manager, while contending that they had not used nearly so much water, said that he was anxious to avoid all publicity and would have to pay what was demanded if it was $30,000. The company had not preserved any record of the quantity of the water so taken. The company then made a payment of $1778 in cash and gave to the defendants twelve promissory notes of $1000 each payable at intervals of one month

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in settlement of the claim. After paying five of these notes, the company brought this action for the cancellation and return of the remaining notes, alleging fraud, duress and undue influence on the part of the defendants in obtaining them and want and failure of consideration therefor.

Held, that, in the absence of evidence on the part of the company to show that the full flow of the pipe had not been used, there was nothing extortionate in the demand made upon the company, and no reason why the settlement made should be set aside as there was neither fraud, duress nor undue influence used in procuring the settlement.

This was a case in which the maxim *omnia præsumuntur contra spoliatorem* was specially applicable.

Lamb v. *Kincaid*, (1907) 38 S.C.R. 516, followed.

Held, also, that the circumstances did not amount to equitable duress or undue influence so as to bring the case within the principle of *Smith* v. *Cuff*, (1817) 6 M. & S. 160.

If one party makes a claim upon another, in the existence and amount of which he has an honest belief, and the other party agrees to pay it without further investigation, the latter will be bound by his agreement: *Dixon* v. *Evans*, (1872) L.R. 5 H.L. 606. And that is so, even although the claim put forward turned out afterwards to be wholly unfounded.

Callisher v. *Bischoffsheim*, (1870) L.R. 5 Q.B. 449, and *Cook* v. *Wright*, (1861) 1 B. & S. 559, followed.

Held, also, that the plaintiffs, by the voluntary payment of five successive cheques extending over five months, had waived any right to rescind the settlement even if there had been any evidence of fraud or duress.

Doll v. *Howard*, (1897) 11 M.R. 577, and *Ormes* v. *Beadel*, (1860) 2 De G. F. & J. 333, followed.

Held, also, that the settlement arrived at could not be set aside for want of any formal acceptance thereof by the City Council.

Judgment dismissing the plaintiffs' action with costs and allowing the defendants a verdict on their counterclaim for the amount of the unpaid notes without costs.

DECIDED: 2nd April, 1912.

Statement

THE above named Company commenced this action to recover possession of seven cheques which had been given to defendants which remained unpaid; also to recover back $2,000 money already paid.

The ground of the action was that the cheques were procured by the defendants under circumstances amounting to fraud, duress, undue influence and upon void and illegal consideration and a consideration which had failed.

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Argument.

C. P. Wilson, K.C., and *J. F. Kilgour* for plaintiffs cited *Williamson* v. *Rover Cycle Company*, [1901] 2 I.R. 189, 615; *St. James* v. *Owen*, 25 S.C.R. 649; *Atkinson* v. *Borland*, 14 M.R. 213, and *Smith* v. *Cuff*, 6 M. & S. 160.

J. E. O'Connor and *S. H. McKay* for defendants cited *St. Louis* v. *The Queen*, 25 S.C.R. 649, 683; *Cotter* v. *Osborne*, 18 M.R. 471; *Lamb* v. *Kincaid*, 38 S.C.R. 516; *Parkinson* v. *Harbury*, L.R. 2 H.L. 1; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Viner* v. *Hawkins*, 9 Ex. 266; *Rogers* v. *Ingham*, 3 Ch. D. 351; *Lawless* v. *Chamberlain*, 18 O.R. 296; *Jones* v. *Merionethshire*, [1891] 2 Ch. 587; *Williams* v. *Bayley*, L.R. 1 H.L. 200; *Piper* v. *Harris*, 15 A.R. 642; *Kneeshaw* v. *Collier*, 30 U.C.C.P. 265; *Boddy* v. *Finley*, 9 Gr. 162; *Armstrong* v. *Gage*, 25 Gr. 1; *Lord* v. *Lloyd*, 7 Scott, 499; *Flower* v. *Sadler*, 10 Q.B.D. 572; *O'Donohue* v. *Swain*, 4 M.R. 476; *Cook* v. *Wright*, 30 L.J.Q.B. 321; *London and County Banking Co., Ltd.*, v. *The London and River Plate Bank*, 21 Q.B.D. 535; *Misa* v. *Currie*, L.R. 10 Ex. 153, 1 A.C. 554; *McLean* v. *Clydesdale*, 9 A.C. 95; *Gordon* v. *London Bank*, [1903] A.C. 240; *Ryan* v. *McKerral*, 15 O.R. 460; *Jones* v. *Gordon*, 2 A.C. 616; *Gissing* v. *Eaton*, 25 O.L.R. 50; *Pease* v. *Randolph*, 21 M.R. 368; *Commercial Bank* v. *Rokeby*, 10 M.R. 281; *Laferriere* v. *Cadieux*, 11M.R. 175; *Patchell* v. *Raikes*, 7 O.L.R. 470; *New Glasgow* v. *Brown*, 39 S.C.R. 586; *Leslie* v *Malahide*, 15 O.L.R. 4; *Macartney* v. *Haldimand*, 10 O.L.R. 668; *Manning* v. *Winnipeg*, 21 M.R. 203; *Ponton* v. *Winnipeg*, 17 M.R. 496, and *Agra Bank* v. *Leighton*, L.R. 2 Ex. 64.

MATHERS, C.J.K.B. Since 1896 the plaintiff Company has carried on the business of producing and supplying electric current for lighting and power purposes, generated partially by means of a steam plant and partially by water power. The City of Brandon owns its own

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water works, and for the purposes of their steam engines the plaintiffs received water from the City. Up to 1903 the plaintiffs had what is known as a "flat rate." A 2-inch upright service pipe ran from the City's main through the floor of the company's power house. From this 2-inch pipe the company took away two 1-inch pipes, one of them just beneath the floor, and the other above the floor. The former was connected with a suction pipe which connected with an engine pump and also with a large tank, and the other with another tank. About the 1st of June, 1903, the City abandoned the flat rate system of charging for the water used by its customers and adopted a measured service rate. For the purpose of measuring the water supplied to the plaintiffs, the City, about that time, installed a meter on the plaintiffs' supply pipe. This meter was placed above the floor and from the meter the plaintiffs took a 2-inch pipe which ran above the floor to the rear basement and from which branched three 1-inch pipes to three several pumps. When this was done the pipe below the floor was not removed, I surmise because the City officials had then no knowledge of its existence. The Company went on using this pipe below the floor when it was necessary to do so for about a year. It was then disconnected from the suction pipe, but the valve was left, and a nipple for a hose connection was put on. It remained in this condition until about the end of 1907 or the beginning of 1908, when the chief engineer, Moring, connected it up with a 1-inch pipe which ran through to one of the tanks. On the 28th November, 1910, the existence of this pipe was discovered by the City officials and the City Engineer was notified. The official who discovered it states that the valve which regulated the flow of water into it was then two-thirds open. He left it in the condition in which he found it and notified the City Engineer, who, with the City foreman, went there and examined the pipe and found it

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as described. The Mayor was notified and he communicated with Mr. Patterson, the Company's manager, and told him what he had been informed. The latter denied that any such pipe was in existence. Moring, the Chief Engineer, was absent, but the manager says that the same evening he spoke to Stanley the second engineer, who informed him that there was a pipe there. He was directed to take it out, and that same night Stanley took out a 5-foot length of the pipe that ran from the valve to an elbow where it connected with the straight pipe running to the tank. He also plugged up the valve and took off the valve wheel. The next day, viz. the 29th, the City Engineer called upon Mr. Patterson and asked him about this pipe, but the latter denied that any such pipe was in existence. He was asked by the engineer to go with him, and he would show it to him, and they went into the pit, but discovered that the 5-foot length was gone. The manager denied that any such pipe had ever been in existence and asserted that it had been plugged as it then was "for years and years." When asked where the pipe ran to he denied all knowledge of where it ran to; but, when told by the engineer that he would pull up the floor of the building and find out, he then informed him that it ran to the tank. At the time of this interview the manager was not aware that the engineer had been to the works the day before and had seen the pipe.

The City obtained statutory declarations from two former employees of the Company to the effect that this pipe had been used for the purpose of running water into the tank, but took no further steps at that time with reference to the matter.

About the 6th of December following, the manager was asked by a reporter of one of the newspapers for his version concerning a rumor on the street that the Company had been taking unmetered water. The manager at once went to Alderman Dowling, Chairman of the

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Water Works Committee, and said he came to see if he could arrange for a settlement, and offered to settle for the water that had been used. Dowling replied that he could not arrange any settlement with him unless he was prepared to admit that the Company had been taking water unlawfully. Patterson replied that he was prepared to admit that the Company was in the wrong. They both then went to the Mayor and arranged to have a meeting of the Water Works Committee called, to which all the members of the Council would be invited.

The desire on both sides was to avoid publicity in the interests of both the Company and the City, which could only be accomplished if all the members of the Council consented. When the meeting convened all members were present. The purpose of the meeting was to arrive at a settlement with the Company for the unmetered water it had taken. The Mayor pointed out that the Company had a bond sale pending and that there was an inspector at that time in the City looking over the Company's affairs, and that it would be injurious to the Company if a charge of this kind should become public. He also pointed out that it would do the City harm, and that it was in the interests of both that a settlement should be made without publicity. One or two members of the Council thought a settlement should not be made, but that there should be a judicial investigation. However, on hearing the statement made by the Mayor, they ceased to press for an investigation and were willing to effect a settlement.

The engineer was asked to prepare a statement of the probable quantity of water used and its value at the rate paid by the Company, namely 12½c. per 1,000 gallons, and he did so. He averaged the meter readings for the three days immediately after the unmetered pipe had been disconnected, getting an average of 48,000 gallons per day. He assumed that was the average used during

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seven and three-quarter years, during which the pipe was in existence. He also assumed that, for 200 days in each year, the steam plant was operated. The total value of the water used at 12½c. per 1,000 gallons would thus be $9,300. From this he deducted the value of the water which had passed through the meter and been paid for, viz., $2,679.98, leaving a balance of $6,620.02. The engineer had nothing definite on which to base his calculation, and one of the aldermen said that in his opinion the City could only be protected by charging the Company for the full flow of that pipe at 40 lbs. pressure during the whole period from the time the meter was installed up to the time the pipe was removed, and asked the engineer to prepare a statement on this basis. He did so, assuming that the pipe was 100 feet long, and on this basis the value of the water amounted to $13,778. Three of the aldermen took the ground that this was the amount for which the Company should be charged. The majority of the members thought that the first estimate of the engineer was sufficient. However, as the minority refused to abate their demand for the full amount, the members of the Council present unanimously agreed that they would ask for the larger amount.

The City Solicitor had been called in and advised the Council in favor of the policy of settlement. When it was decided to call in Mr. Patterson and ask for the larger amount, the solicitor warned them that they must make no threats, and advised that the accounts should be presented through the ordinary water works officials. In order to avoid the appearance of threat, it was decided that only one, either the Mayor or the Chairman of the Committee, should be spokesman, that the engineer should present the account, and that the other members should say nothing. Mr. Patterson, the manager, was called in and stated his desire to settle. The engineer then told

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him the amount. The chairman, Alderman Dowling, asked him if he accepted the bill and he replied, of course he accepted; if it were $30,000 he would have to accept it. Alderman McKenzie asked him if it were possible for him to have used that quantity of water, and he said it was not.

Considerable discussion took place then between the aldermen themselves, the majority arguing in favor of acceptance of the smaller bill, but the others standing firmly in favor of accepting only the larger amount. Mr. Patterson was then asked to retire, but the discussion still continued. Finally Alderman Whillier left the room, stating as he was leaving that they must settle for the larger amount or they would hear from him, or there would have to be a public investigation or something to that effect. As the minority would not yield to the views of the majority, in order that a unanimous decision should be come to, the majority agreed to accept the views of the minority and demand payment for the full flow of the pipe. This decision having been arrived at, it was decided that an account for the amount agreed upon should be presented to the Company for payment the next morning by one of the clerks in the Water Works department, and the Mayor was appointed to take settlement.

Accordingly, on the 7th December, Patterson was presented with a bill for unmetered water, amounting to $13,778, by the Water Works collector, who asked him if he would pay the amount, and he said he would. It appears that he afterwards represented to the Mayor that the amount was a very large one to pay at once, and asked if it could not be extended over a year. For the purpose of deciding this point, the Mayor called another meeting of the members of the Council on the 8th December. All members were present at this meeting except Aldermen Dowling, Whillier, Clark and Coleman, and it was agreed to accept as payment $1,778 cash and twelve cheques for

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$1,000 each, maturing over a year, a month apart. At this meeting the Mayor told Patterson what the attitude of the minority had been at the other meeting and that they would not consent to a settlement for anything less than the full amount. One or two of the aldermen urged Patterson then not to give the cheques, and said he was a fool to do so, but he went on and signed and handed over the cheques to the Mayor. These were handed to the City Treasurer, who, as the cheques matured, handed them to the water works collector for collection.

The first cheque for $1,778 was paid, as were also five of the monthly cheques given. The plaintiff Company on the 28th June, 1911, notified the Bank to refuse payment of the additional cheques. On July 3rd the City Council referred the matter "of the stoppage of payment of the post-dated cheques deposited with the Treasurer" by the plaintiffs "to the finance committee to discuss the matter with Mr. Patterson and report at a subsequent meeting of Council." Alderman Hughes, the chairman of that committee, made an investigation of the Company's books and prepared a report, dated 17th November, 1911, which was assented to by the finance committee, that the amount already paid by the Company upon the cheques "represents an amount much in excess of the price of the quantity of water which could possibly have been used by the Company from the pipe in question," and recommending "that the amount already paid by the Company be accepted in full settlement of all claims against the Company in respect of the said matter, and that the City Solicitor be instructed to return the balance of the cheques to the Company." This report was, by resolution, adopted by the Council on the same day, but was not acted upon.

On the 4th December, 1911, the Company commenced this action to recover possession of the seven unpaid cheques, and also to recover back $2,000 of the money

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already paid. The ground of the action is that the cheques were procured by the defendants under circumstances amounting to fraud, duress, undue influence and extortion, and upon void and illegal consideration and a consideration which failed.

On the 29th December, 1911, the City Council by resolution, unanimously rescinded the said report of the finance committee dated the 17th November, and the resolution adopting it.

I find that, when the meter was installed by the City, the pipe in question was connected with the City service pipe underneath the floor and was not then disconnected because the officials performing the work were not aware of its existence. The Company's servants continued to pass water through this pipe as they required for about one year. At this time the pipe communicated with a suction pipe. It was then removed from the suction pipe and a nipple and hose connection put on. Water was taken to the tank from this pipe by means of a hose from time to time as required until about the end of 1907 or the beginning of 1908, when, as before stated, the Chief Engineer of the Company himself installed an iron 1-inch pipe running through to the tank and after that date water was used through this pipe.

I find that the fact that water was being used through this pipe was known to the engineers and servants of the Company, and was also known to the manager, Mr. Patterson. At the trial he denied on oath that he had any knowledge of the existence of this pipe. His evidence on that point appeared to me utterly improbable; but, when taken in connection with the surrounding circumstances and his own conduct after it was discovered by the City, and the evidence of Stokes, I have no hesitation at all in finding that water was used through this pipe with his entire knowledge and concurrence. It would be remarkable if the existence and use of this pipe was known

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to everybody employed around the works with the exception of the active manager.

After the City officials had discovered that the Company had been clandestinely taking water by means of the pipe in question, the Company's manager became alarmed at the consequences to the Company's credit and reputation if the fact should become public, and possibly from the fear that the Company might be publicly charged with stealing water. In order to, if possible, prevent this, he went to the City to procure a settlement of the claim, which he knew the City had against the Company. His purpose could only be accomplished by a secret settlement and he requested that the facts be not made public. The Mayor and aldermen were quite prepared to meet his wishes as to secrecy, both for the sake of the Company and the City, and were also willing to accept payment for the water wrongfully used, and the only point on which there was any divergence of opinion was as to the means of arriving at the quantity so used. There was not then, and is not now, any known means of ascertaining with even approximate accuracy the quantity of water improperly passed through this pipe. When the aldermen met on the 6th December at the Company's request, to discuss a basis of settlement, they had before them nothing but the bald fact that this pipe had been in existence since 1903 and that it had been used by the Company. They had no information as to the extent of such user. Mr. Patterson knew, or had the means of knowing, whether or not it had been in constant use, but he chose to assume the attitude of entire ignorance and offered no information to aid the Aldermen to a conclusion. The Company had gone on for years deliberately appropriating the City's water without preserving any record of the quantity so taken. In such a case the maxim *omnia præsumuntur contra spoliatorem* must be applied and every presumption be made against the

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Company. The principle applicable is well illustrated by the case of *Lamb* v. *Kincaid,* 38 S.C.R. 516. There a quantity of auriferous material was taken from the disputed and undisputed portions of a mining claim by the defendant, who intermixed the products without keeping any account of the quantities taken from these portions respectively, and appropriated the gold recovered from the whole mass. The Court held the defendants accountable for as much of the mixed product of the two claims as they did not strictly prove to have come from their own. Duff, J., at p. 541, speaks of this as a "long settled doctrine of English law." Again, at p. 540, he says: "The Court is not called upon to speculate in such a case for the benefit of deliberate wrong-doers, they come within the wholesome rule that, if a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong," citing the well-known leading case of *Armory* v. *Delamirie,* 1 Strange, 505.

Lamb v. *Kincaid* was a case, not of destroying evidence, but of not preserving evidence of the extent of the wrong done. In that respect it applies exactly to this case. The plaintiffs have tortiously taken the City's water without preserving any record of the quantity used. *Prima facie* they were bound to pay for the full flow of the pipe for the entire period. Those members of the City Council who took this stand were, in my opinion, but asserting the strict legal right of the City. If the Company did not want to accede to this demand the onus was upon them to show by undoubted evidence that the full flow of the pipe had not been used. There was nothing extortionate on the part of the City in claiming $13,778. In arriving at that amount the engineer had assumed that the pipe was 100 ft. long and that the pressure was 40 lbs., but he had only charged 12½c. per thousand gallons, which is a

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special manufacturers' rate. The rate fixed by the City by-laws for general consumption was much in excess of this. The Company would have no right to claim the benefit of a special rate granted them for metered water for water surreptitiously taken, and the City would have a perfect right to charge them for water so taken at the general rate fixed by its by-laws. Calculated at the by-law rates the value of the water the pipe was capable of carrying would be $23,409. The pipe, however, was not over 50 ft. long, and the pressure was probably not more than 30 lbs. The value of the water the pipe was capable of passing on this basis, even at the special rate of 12½c. would be $16,689, and at the general rates would be $27,600. So that it does not appear that the City made its claim anything like as large as it might have made it with perfect propriety.

When the amount the City asked was mentioned to Mr. Patterson at the meeting on the 6th December, and he was asked if he would accept it, he said, of course he would accept it, he would have to do so if it were $30,000. He neither tendered, nor offered to tender, any evidence that the quantity of water charged for had not been used. He did say before leaving, in response to one of the aldermen, that it was not possible for the Company to use that quantity of water, but he suggested no method by which the quantity could be more accurately arrived at.

Indeed he gives as the reason for his delay in stopping payment of the cheques that he was not earlier in possession of data from which to calculate even the ultimate quantity of water used.

When the account was presented to him the next day he again promised to pay it and he telephoned the City Engineer to ask about the odd $778 as he had understood the amount was even $13,000. On the 8th, when he signed and handed over the cheques to the Mayor, he was subjected to no pressure or duress to do so. Dowling and

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Whillier, the leaders of the minority, were not present. Even Fleming, who had favored an investigation, urged him not to give the cheques, as also did some others. He knew a large majority of the Council, including the Mayor, were in favor of accepting in settlement $6,600, the first estimate of the City Engineer. He must be taken to have known that, if the matter were allowed to take the usual course, the majority could enforce their views on the minority. Such a course, however, would involve exposure and probably public discussion of the Company's conduct in the Council and in the press, and in order to stifle publicity he was willing to pay the amount asked. I am satisfied that those members of the Council who refused to consent to any settlement for less than $13,778 acted with perfect *bona fides* and in the honest belief that in no other way could the City's interests be fully protected. There was no disposition on the part of either the Mayor or any of the aldermen to take advantage of the position in which the Company found itself. The evidence entirely fails to establish either fraud, duress, or extortion on the part of the City.

It is contended, however, that the cheques were given under circumstances which in law amounted to equitable duress or undue influence. In support of this contention *Smith* v. *Cuff*, 6 M. & S. 160, was relied upon. That was the case of a creditor who refused to execute a composition deed with his debtor unless the latter gave him notes for the balance of his claim, and threatened a commission in bankruptcy. The debtor gave the notes which were transferred to an innocent party and afterwards paid by the debtor, who then sued the creditor for the amount so paid. In argument counsel for the debtor put the case upon the ground that it was a fraud upon the other creditors. The defendant's counsel admitted the principle, but urged that the plaintiff could not recover as he was *pari delicto*. Lord Ellenborough, in answering the defendant's argu-

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ment, said: "This is not a case of *par delictum,* it is oppression on one side and submission on the other: it could not be predicated as *par delictum* when one holds the rod and the other bows to it," and he concluded by saying that there was no case where, money having been obtained "extorsively and by oppression and in fraud of the party's own act as regards the other creditors, it has been held that it may not be recovered back." It appears quite clear that the basis of the decision was the fraud upon the other creditors. It would hardly be suggested that a sole creditor who refused to compound with his debtor, and insisted upon payment of the full claim under threat of bankruptcy proceedings, would be compelled to refund what he had received over and above the composition offered. If the defendant in *Smith* v. *Cuff* had openly made his execution of the deed conditional on being given notes for the balance of his debt and the other creditors had executed it with knowledge of such condition, he could not have been compelled to refund the amount collected upon them. In my opinion *Smith* v. *Cuff* has no application to the facts of this case. Here the Company had by its own misconduct brought about a situation fraught with danger to its credit and reputation. In order to escape from this situation the Company approached the City with a proposition that it should pay. The City stated an amount it was willing to accept. The method of computation adopted by the City was logically and legally sound; and the Company agreed to pay the amount. It is but the case of one party making a claim upon another in the existence and amount of which he has an honest belief, and the other party agreeing to pay it without further investigation. Under such circumstances all that a Court of justice has to do, with respect to the agreement arrived at by the parties, is to ascertain that it has been *bona fide* made. If so made a Court of justice ought to respect it and not allow it to be ques-

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tioned: *Dixon* v. *Evans,* L.R. 5 H.L. 606. And that is so even although the claim put forward turned out afterwards to be wholly unfounded: *Callisher* v. *Bischoffsheim,* L.R. 5 Q.B. 449, and *Cook* v. *Wright,* 1 B. & S. 559.

The plaintiffs have therefore, in my opinion, failed to show that they were induced to give the cheques in question either by the fraud, duress, undue influence or extortion of the defendants or that the consideration therefor was either void or has failed.

The other grounds of action alleged in the statement of claim were not supported by the evidence and were not pressed in argument.

Even if there had been any evidence to support a finding of fraud or duress against the defendants, the plaintiffs have, by the voluntary payment of five successive cheques maturing over five months, waived their right to rescind: *Doll* v. *Howard,* 11 M.R. 577; 7 *Hals.* 357, and *Ormes* v. *Beadel,* 2 D. G. F. & J. 333. The Company's bond sale was consummated before the end of the year, when all reason to apprehend financial embarrassment from an exposure was removed, yet the Company went on and paid a cheque for $1,000 on the last day of each of the following months of January, February, March, April and May. It seems to me idle to contend that, after such an unequivocal affirmation, they have a right to attack the transaction.

It is said, however, that the settlement was only made with a committee of the Council and that the agreement never was adopted by the Council. I think the plaintiffs, by their pleading, have deprived themselves of the right to successfully urge this objection. By paragraphs 7 and 8 of the statement of claim the plaintiffs admit that the account for $13,778 for unmetered water was rendered by the defendants to the Company, and that the cheques were given by the Company to the defendants. Supplying of

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water and collecting the charges therefor is part of the City's regular routine business. When an account for water has been presented and cheques given in payment therefor, it would be singular if the City could not retain and collect such cheques without showing that they had been formally accepted by the City. They were in this case accepted by the Mayor with the concurrence of the whole Council and handed by him to the proper official, the treasurer, who from time to time handed them out for presentation at the bank. The Mayor, for some reason not apparent, warned the treasurer that he gave no instructions with respect to the cheques. No instructions, however, were necessary. Having received them as payment of a water account it was his duty to collect them and he proceeded to do so. If evidence of ratification by the City were necessary, the receipt and retention of the proceeds of the six paid cheques would supply it.

It was admitted that the adoption by the City Council of the Finance Committee's report of the 17th November affords the Company no ground of action against the defendants. Such report does, however, as was contended, afford evidence for the plaintiffs of the quantity of water the Company's works were capable of consuming. For the purpose of considering the validity of the settlement arrived at, it is not the facts which subsequent investigation, conducted by the City, brings to light that are to be looked at, but the facts and information present to the minds of the aldermen when the agreement was arrived at. Besides, the report only pretends to take account of the water the Company would probably consume in the operation of its plant. There is always the possibility that that pipe may have been carelessly allowed to run when the steam plant was not in operation. While this may be regarded as an improbability, it was still a possibility which might reasonably operate on the minds of the aldermen.

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In my opinion the plaintiffs' action fails and must be dismissed.

The defendants have counterclaimed for $7,000 balance due for unmetered water taken.

It follows from what I have said that the City would be entitled to judgment for the unpaid cheques if it had counterclaimed therefor. The defendants' counsel asked leave to amend and I think the leave ought to be given.

The defendants also asked leave to amend as indicated in notices of motion dated 11th and 15th January, 1912, to which the plaintiffs ask leave to reply as indicated in notice dated 5th February, 1912. I allow both amendments.

The plaintiff's action will be dismissed with costs and, upon the defendants amending their counterclaim so as to make it a claim upon the unpaid cheques, there will be judgment for the defendants upon the counterclaim for $7,000, without costs.

I think this is a case of "special importance or difficulty" within the meaning of 7 & 8 Ed. VII, c. 12, s. 1, and, in the exercise of the discretion conferred upon me by that Act, I allow costs to be taxed without regard to the statutory limit of $300. I also grant fiat for costs of examination for discovery.

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KOLEGA v. GENSER.

Before THE REFEREE.

Garnishment—Fi. Fa. Goods—Satisfaction of judgment—Executions Act, R.S.M. 1902, c. 58, ss. 24, 25.

Since the enactment of the statutory provisions now contained in sections 24 and 25 of The Executions Act, R.S.M. 1902, c. 58, payment to the sheriff of the full amount of an execution in his hands does not operate as a discharge of the judgment so as to entitle the judgment debtor to a discharge of a garnishing order issued by the judgment creditor attaching money of the judgment debtor in the hands of the garnishee, because the sheriff has to keep the money for three months to enable other creditors of the judgment debtor to put executions in his hands, in which case the judgment creditor might not receive payment in full out of the money so paid to the sheriff.

DECIDED: 27th September, 1912.

Statement

THE plaintiff, having recovered judgment in this action for $1,000, issued a writ of execution and placed it in the hands of the Sheriff and at the same time procured and served a garnishing order attaching the defendant's money in the Bank of Nova Scotia to the extent of the judgment.

The Sheriff seized goods of the defendant under the execution whereupon the defendant paid the amount to the Sheriff together with costs and Sheriff's fees.

Defendant moved for an order to discharge the garnishee so as to release the money attached in the hands of the latter.

W. P. Filmore for plaintiff.

A. K, Dysart for defendant.

THE REFEREE. Before the enactment of the statutory provisions now contained in sections 24 and 25 of The Executious Act, R.S.M. 1902, c. 58, payment to the Sheriff of the full amount of the execution undoubtedly operated as a discharge of the judgment, and the Sheriff would make a return of money made to the writ, but now he has to retain the money for three months to enable other creditors of the same judgment debtor to put

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executions in his hands for the amounts of their claims; and, in the event of there being any such at the end of the three months, the first execution creditor will only be entitled to receive his *pro rata* share of the money realized.

In such case, therefore, the Sheriff would be entitled to make a further levy to realize the balances of the claims of the first as well as the other execution creditors. So that, until it shall appear that there are no other execution creditors to share in the money paid in by this defendant, it cannot be known with certainty whether the plaintiff's judgment and execution are satisfied or not, and the Sheriff cannot return the writ. It is urged on behalf of the plaintiff that to discharge the garnishee now would put the plaintiff into such a position that he might eventually only receive a percentage of the amount of his judgment, and that he is entitled to retain the lien upon the moneys attached which is given him by Rules 759 and 762 of the King's Bench Act as a security that he will ultimately receive payment of his judgment in full.

The statutes have made no provision for such a case and the point does not seem to be covered by authority.

It is not, therefore, without some hesitation that I come to the conclusion that I must refuse the order asked for, but I do so without costs.

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IN THE COURT OF APPEAL

REX v. LAUGHTON.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Criminal law—Pound breach and rescue—Ultra Vires—By-law of Municipality—6 & 7 Vic. (Imp.) c. 30—Municipal Act, R.S.M. 1902, c. 116, s. 644.

Rescuing animals from a pound keeper while being lawfully conveyed by him to a pound is a criminal offence punishable, under 6 & 7 Vic. (Imp.) c. 30, in a prosecution before two justices of the peace, and the council of a municipality has no power, under section 644 of The Municipal Act, R.S.M. 1902, c. 116, or otherwise, to pass a by-law providing for the punishment of such an offence in a prosecution before one justice of the peace.

The conviction, therefore, of a defendant of such an offence by one justice of the peace under such a by-law should be quashed.

DECIDED: 7th October, 1912.

Statement

APPLICATION to quash a conviction. The defendant, Clifford Laughton, was fined $27.50 by a justice of the peace of the Rural Municipality of Assiniboia for unlawfully rescuing thirty head of cattle from the pound master of the municipality while the cattle were in the lawful custody of such pound keeper and being conveyed by him to No 5 pound as provided by the by-laws of the municipality.

The application was made on the ground that the charge was not laid before two justices of the peace and was not heard before two justices of the peace as required by 6 & 7 Vic. (Imp.) c. 30; one justice of the peace having no jurisdiction respecting the charge; that the by-law was *ultra vires* of the Rural Municipality of Assiniboia inasmuch as it contained a clause imposing and providing a penalty for rescuing animals from a pound, or while being conveyed to a pound, and the statute did not grant the municipality power to pass any such by-law in respect of the offence, which being a criminal matter the Province had no power to give the municipality jurisdiction to deal with.

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Argument.

H. F. Tench for defendant. The offence charged in this case is a criminal one under the Imperial Act to amend the law relating to pound breach and rescue in certain cases: 6 & 7 Vic., c. 30. By that Act the case must be tried before two justices of the peace: *Reg* v. *Shaw*, 7 M.R. 518.

J. E. O'Connor, K.C., and *C. Isbister* for the prosecutor cited *Reg* v. *Beale*, 11 M.R. 448; *Queen* v. *Purdey*, 34 L.J. M.C. 4.

THE COURT quashed the conviction holding that the charge and conviction were of a criminal nature and that, under the Imperial statute of 6 & 7 Vic., c. 30, the charge could not be dealt with by one justice sitting alone.

IN THE COURT OF APPEAL.

ZDRAHAL v. SHATNEY.

Before RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Criminal conversation—Evidence—Marriage—Proof of foreign marriage—Marriage certificate in foreign language—Defendant's admission of the marriage—Marriage Act, 1906, *Man.* s .30.

Action for criminal conversation. To prove the marriage the plaintiff swore at the trial that he had been married to the woman in a Roman Catholic church in Hungary according to the rites of the Roman Catholic Church and had also gone through a marriage ceremony with her in a civil court, and that they had lived together as man and wife for sixteen years and had issue. He also put in letters written by defendant in which he spoke of the woman as the plaintiff's wife. There was also produced what purported to be a certificate in the Hungarian language of the marriage of the parties, according to the evidence of a witness who interpreted it. No translation of it was made nor was the document filed as an exhibit in the Court.

Defendant moved for a nonsuit on the ground that there was not sufficient proof of the marriage.

The trial Judge ruled that the case must go to the jury and the plaintiff got a verdict.

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On appeal.

Held, by RICHARDS and PERDUE JJ.A., that, in such an action, the marriage must be proved with the same strictness as in a prosecution for bigamy, and that it was necessary to show what was the marriage law of Hungary and that it had been complied with.

Morris v. *Miller*, (1767) 4 BURR. 2057; *Birt* v. *Barlow*, (1779) 1 Doug. 174, and *Catherwood* v. *Caslon*, (1844) 13 M. & W. 261, followed.

Also that the defendant's admissions of the marriage furnished no proof of the marriage, although, in a bigamy case, the admission of the accused might be evidence of his own former marriage; also that the evidence as to the alleged marriage certificate had been improperly admitted in the absence of proof that it had been extracted from records required to be made by the laws of Hungary and that such certificate would have been evidence in Hungary of the marriage.

Held, by CAMERON and HAGGART, JJ.A., that the plaintiff's sworn testimony, strengthened as it was by the defendant's admissions, was sufficient to prove a marriage *in fact* or an *actual* marriage, which is all that the cases of *Morris* v. *Miller* and *Birt* v. *Barlow*, *supra*, show to be necessary.

Catherwood v. *Caslon*, *supra*, and *Reg.* v. *Smith*, (1857) 14 U.C.R. 565, distinguished.

Rex v. *Naoum*, (1911) 24 O.L.R. 306, followed.

Held, also, per HAGGART J.A., that section 30 of "The Marriage Act, 1906," c. 41 of 5 & 6 Edward VII, (Man.), applies to marriages solemnized anywhere and legalizes the marriage in question.

The Court being equally divided, the appeal was dismissed without costs.

DECIDED: 4th November, 1912.

Statement

THIS action was brought to recover damages for criminal conversation by the defendant with the plaintiff's alleged wife. The action was tried before Macdonald, J., who allowed the case to go to the jury and they gave a verdict for the plaintiff. The defendant moved to set aside the verdict and enter a nonsuit on the ground that the evidence did not establish, to the extent required in a case like this, that the woman in question was the plaintiff's wife.

E. L. Howell for defendant, appellant, cited *Fleury* v. *Campbell*, 18 P.R. 110; *Brandis* v. *McConnell*, (not reported); *Campbell v. Carr*, 6 O.S. 482; *Reg.* v. *Smith*, 14 U.C.R. 565; *Lyell* v. *Kennedy*, 14 A.C. 437; *Reg.* v. *Duff*, 29 U.C.C.P. 255; *Bater* v. *Bater*, [1906] P.D. 269;

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Westlake v. *Westlake*, [1910] P.D. 167; *McMillan* v. *Jelly*, 17 U.C.C.P. 702, and *Patterson* v *McGregor*, 28 U.C.R. 280.

N. F. Hagel, K.C., for plaintiff, respondent, cited *Goodright* v. *Moss*, 2 Cow. 593; *Catherwood* v. *Caslon*, 13 M. & W. 261, and *Yelverton* v. *Yelverton*, 1 S. & T. 574.

RICHARDS, J.A. The evidence adduced at the trial showed that the plaintiff and the woman had lived together, as man and wife, in this country. The plaintiff swore that he had been married to her in Hungary, apparently by the rites of the Roman Catholic church. He did not pretend to have any knowledge of the laws of Hungary, or to be in any way qualified to say whether the marriage was a legal one. The effect of his evidence is merely this, as I take it, that he went through a ceremony which he believed made himself and the woman man and wife.

There was also produced to the Court, although apparently not filed as an exhibit, according to the Registrar's entries in his book, a document in the Hungarian language. A witness was called who spoke both Hungarian and English, who apparently stated its effect to the Court. There is no translation of it amongst the papers or in the evidence. This witness gave no evidence whatever to show himself versed in the law of Hungary as to marriage. He stated that it was a marriage certificate, issued in the Hungarian language, by Hungarian authorities, and that it was an official marriage certificate. He said that it was from a Budapest Roman Catholic Presbytery, or residence of the Roman Catholic priest, purporting to be made up from a certain marriage book. Apparently he did not translate it literally but gave what he said to be the effect of it. I take his evidence only to mean that, after reading it over, it seemed, on its face, to him to be a marriage certificate.

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No evidence was called as to the laws of Hungary with regard to marriages; so that there is nothing before the Court to show where, or how, the marriage ceremony might be lawfully performed according to the law of Hungary, and there was also no evidence whatever to show that the register, from which this certificate purported to be taken, was a public register, or record, or that either the register, or the extract or copy, whichever it was, which was produced to the Court, would be evidence of the marriage in the courts of Hungary.

There was the further evidence relied on that the defendant, in letters he had written, had referred to the woman as the plaintiff's wife. There was no evidence to show that he knew this, further than might be implied from the fact that he knew they were living together as man and wife.

The first English case of importance, it seems to me, is *Morris* v. *Miller*, 4 Burr. 2057. That was an action for criminal conversation. Proof was given of cohabitation and general reception of the woman as the man's wife, and it was proved that, after their alleged marriage, articles had been drawn up between them for the settling of the wife's estate; and I assume that therein she was referred to as his wife. At the end of the argument, and before judgment was delivered, Lord Mansfield said:

"Proof of *actual* marriage is always used and understood in opposition to proof by cohabitation, reputation, and other circumstances from which a marriage may be inferred."

In delivering the judgment of the Court he said:

"We are all clearly of opinion, that in this kind of action * * there must be evidence of a marriage *in fact;* acknowledgment, cohabitation and reputation are *not sufficient* to maintain this action.

"This is a sort of criminal action. * *

"It shall not depend upon the mere reputation of a marriage, which arises from the conduct, or declarations, of the plaintiff himself.* *

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"No inconvenience can happen by *this* determination; but inconveniences might arise from a *contrary* determination, which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action."

There was a judgment of nonsuit.

In *Birt* v. *Barlow*, 1 Doug. at p. 174, Lord Mansfield says:

"An action for criminal conversation is the only *civil* case in which it is necessary to prove an *actual* marriage. * * An action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of *wife* to women to whom they are not married, it struck me, in the case of *Morris* v. *Miller*, that in such an action a marriage in fact must be proved."

In *Birt* v. *Barlow*, an actual marriage was proved but a rule for a nonsuit was made absolute, for lack of evidence of identification of the plaintiff and his alleged wife, as the actual persons who were so married. Towards the end of the judgment Lord Mansfield suggests that there might have been proof in such a case by the bell ringers, the hand-writing of the parties, or the persons present at the wedding dinner, but it must be noted that, in so doing, he was only referring to the question of identification of the parties and not to proof of the marriage itself.

In the report of *Morris* v. *Miller* in 1 W. Bl. 632, it is stated that Lord Mansfield suggested that, if the register had been burned and the parson and clerk were dead, the marriage might be proved by a person present at the wedding dinner, and that stricter proof would be required in a case of bigamy than in one of criminal conversation. Those statements do not appear in the report in 4 Burr. 2057 cited above, which seems to be really the more careful one. I can not but think that, if made, the proof by the person at the wedding dinner was meant only to refer to proof of the identity, as in the subsequent case of *Birt* v. *Barlow* (*supra*). But, in any case, these observations, if made,

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were *obiter dicta* and the suggestion as to less proof being required than in bigamy has not been followed. Also, they could not be taken as covering the case of proving a foreign marriage, as to which the case of *Catherwood* v. *Caslon* and the *Sussex Peerage Case,* 11 Cl. & Fin. 35, 8 Jur. 793, which I refer to later on, hold that there must be proved as a fact, by persons versed in the laws of such country, what the law there was as to marriage, and that the ceremony was in accordance with that law.

I take it that the marriage that had to be proved in an action for criminal conversation in England (before that kind of action was abolished there), could have been proved by the evidence of witnesses who were present at, and saw the ceremony take place in a church building of the established Church of England, in England. But that would be held sufficient because the courts took cognizance of the fact that by the law of England all such churches were places where marriages might lawfully be solemnized. But, even in England, where the marriage, to be so proved, took place in a chapel of any other religious body than the Church of England, the testimony of such witnesses had to be supplemented by proof that such chapel was licensed for the performance of marriages. *Reg.* v. *Manwaring,* 1 Dearsly & Bell, 132. In other words, such a marriage had to be *proved* to have taken place according to the marriage law of England. With such further evidence required of a marriage, in the very country where the action is brought, it seems to me impossible to hold that, in the case of a foreign marriage, proof that it was celebrated according to the law of the country where it took place could, in a similar action, be held unnecessary.

Catherwood v. *Caslon,* 13 M. & W. 261, was another action for criminal conversation. The plaintiff, an Englishman, domiciled in England, went through a mar-

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riage ceremony at the English Consular office at Beyrout in Syria with the daughter of the Consul, who was an Englishman. The marriage was celebrated by an American missionary, according to the rites of the Church of England, though the missionary was not proved to have been in Episcopal Orders. The parties cohabited and were received as man and wife and a son was afterwards born to them. The case went to the jury and the plaintiff recovered a verdict. A special case was submitted to the Court of Exchequer, by which the Court were to be at liberty to draw any inferences which, in their opinion, the jury would be at liberty to draw from the facts, and the question was whether the proceedings constituted a marriage. Parke, B., delivered the judgment of the Court, holding, that, because the missionary was not proved to be in Episcopal Orders, such a marriage was not valid by the Common Law of England. He then said:

"But, on the second argument, it was contended that, in the action for criminal conversation, which is, as it was argued, an action against a wrongdoer, it was quite sufficient to prove that the parties intended to celebrate, and that *in their belief* they did celebrate, a lawful and formal marriage, and that, as they afterwards cohabited as man and wife, upon the faith of this *bona fide* belief, it constituted *prima facie* a sufficient marriage *de facto,* and was a good foundation for the plaintiff's maintaining this action against the defendant, at least until the defendant showed affirmatively that the marriage was unlawfully contracted, which it is clear he has not done here. Upon the facts as stated, we do not know what was the marriage law of Syria, where this took place, as to the marriages of British subjects there residing, nor whether British Christian subjects might not marry by a form allowed in that country, without any violence to their religious feelings. And we, therefore, are left in complete uncertainty whether the marriage be unlawful, if it be necessary for the defendant to show that to be the case. The question, therefore, is, whether the plaintiff must in the first instance show this marriage to be clearly legal, or whether he has done sufficient to cast the burden of showing the

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contrary on the defendant.' And we think that this burden is on the plaintiff, and that he has not done sufficient to establish a *prima facie* case against the defendant. The cases of *Morris* v. *Miller,* 4 Burr. 2057, 1 W. Bl. 632, and *Birt* v. *Barlow,* 1 Doug. 171, and the uniform practice ever since their decision, seem to have settled that, in actions of this nature, as in the indictment for bigamy, it is necessary for the plaintiff to show what the courts call a marriage in fact, which we think is an actual marriage, valid, or avoidable, and not yet avoided: see 3 Inst. 88: and that acknowledgment, cohabitation and reputation, which raise a presumption of a valid marriage, are not sufficient.

"Unless the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony, which the parties *suppose* to be sufficient to constitute that relation, is not enough. It must be shown to be sufficient according to law for that purpose. If this were not required, it might happen that a defendant might be made responsible in a case in which the act complained of was done by the supposed wife, with the full intent of putting an end to the invalid and void contract into which she might have entered. It is, therefore, very reasonable to hold that a husband, in this action, must establish a contract of marriage binding both on himself and on his wife, and show the fact of adultery during the continuance of this contract."

"Here the plaintiff has not shown such a contract. It is quite consistent with all the facts here proved, that the supposed wife of the plaintiff has quitted him, and gone to cohabit with the defendant, because, though at the time of the ceremony she intended to contract, and believed she did contract, marriage with the plaintiff, she has since discovered that she made no contract binding upon her on that occasion. If she married the defendant, she could not on this proof be convicted of bigamy and, according to the authorities, the two cases appear to depend on the same principle."

I have quoted this at length because it seems to me very strongly in point. It tends to show that a marriage in a foreign country must be shown to have been according to the law of that country, and that the burden of showing

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this is on the plaintiff, and that, not having shown it, he does not establish an actual marriage or marriage in fact. The learned Judge gives, at greater length and more fully, the same reasons which Lord Mansfield relied on in the cases above cited.

In the *Perth Peerage case,* 2 H.L.C. 865, the claimant, in proof of his pedigree, put in evidence attested copies of extracts from the register of marriages, birth and deaths kept in certain places in France. The witness who produced them, and had compared them with the originals, proved that they were kept in an official place and under the care of official persons.

It will be noted that two things were there proved which are not proved in the present case; that is, that they had been compared with the originals, and were kept in official places under the care of official persons. Yet this evidence was objected to on the ground that these documents were matter of foreign law, which foreign law should be proved by competent witnesses, and that it must be proved that the registers were kept according to the laws of France, and that they would be received in evidence in France. The Lords of the Committee agreed with this, and required the evidence of a French lawyer to prove the above facts, before they would receive these certificates in evidence.

It is stated in a number of cases that the proof of marriage, in a case like this, must be as strong as would be required in a case of bigamy.

Reg. v. *Smith,* 14 U.C.R. 565, was a case of bigamy. To prove this marriage (to one Mary Patterson) two parties, who had been present at the wedding, gave evidence. One of them had, himself, been married at the same time. Their evidence was that the marriage took place before one Parsons, a justice of the peace, at Manchester in the State of New York. One witness testified that he subsequently saw the fact of that justice of the peace's election, as such, in the town records of

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Manchester, in the possession of another justice of the peace, and in the latter's office, and was told by him that it was a record book, and that the book did contain entries of the election of town officers. Sir John Robinson delivered the judgment of the Court of Queen's Bench for Upper Canada. After reciting the facts, he stated as follows:

"Now, we know that by the common law of England such a person could not legally solemnize marriage. In our own country we know that a justice of the peace could do so, and can still under certain restrictions, but we are not therefore at liberty to infer that a justice can do the same in the foreign country where it is alleged the prisoner was married to Mary Patterson. Proof therefore was necessary of the authority, and the proof that was given amounts only to this: that Parsons was a justice of the peace in the State of New York at the time; that he did as such assume to solemnize matrimony in another instance as well as in this; and the same witness who swears this, the brother of Mary Patterson, swears in direct and positive terms that Parsons, as a justice of the peace, had authority in the State of New York to marry. The witness, who gave this evidence, did not state whether it was by any written law of that country that the authority was given, or whether without any written law marriages by a justice of the peace are or were then held valid in that country. We can as individuals have no doubt that he speaks correctly, for we have heard the authority of justices of the peace to solemnize marriage in the State of New York proved upon various occasions in such a manner as was clearly sufficient according to our law of evidence. But we cannot act in a case of this kind upon the knowledge which we have acquired in other cases; and the question is whether evidence of the foreign law in this respect, given by a person who never at any time, for all that appears, was a lawyer, or an inhabitant of the foreign country in question, can be received as evidence.

"We are of opinion that it can not, and that in this case such proof of a valid marriage as the law requires was not given."

Reg. v. *Duff*, 29 U.C.C.P. 255, was another case of bigamy. The evidence produced was, first, a deed of

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land, made by the accused, after the second marriage, to a trustee, to pay the rents and profits to the first wife. This deed contained a power of revocation by the grantor. The trustee named in the deed testified that the accused told him when the deed was made that the land had been bought with the first wife's money, and he wanted the rents to go to her every three months. He stated to the trustee the name and address of the first wife. The trustee's wife testified that she had heard the accused asking the trustee to take upon him the trust for the benefit of the accused's first wife and their child.

On a reserved case it was held by Wilson, C.J., and Gwynne and Galt, JJ., that the evidence showed that the the object of the deed was, really, to deprive the second wife of any claim on the land, and that the statements of the accused, of the existence of the first wife, were not statements against his own interest and therefore were not evidence against him.

In *Wigmore on Evidence,* sections 2084 and 2085, it is admitted that the law, as to evidence necessary to prove a marriage, was plainly determined in *Morris* v. *Miller,* and *Birt* v. *Barlow,* and has ever since been accepted. He holds the grounds taken by Lord Mansfield to be that the action was penal in its nature and says that it has always been so treated in a marked manner in England, and also that, to receive habit and reputation alone, might enable a man having a mistress to recover damages for her seduction. Wigmore says that, so far as the first reason is concerned, it stands, or falls, with the general policy of establishing a special rule for criminal cases, and that, so far as the second reason is concerned, it is indeed based on a real contingency, yet he thinks it doubtful whether there is any need of exercising special vigilance on behalf of a defendant, whose conceded conduct deprives him of honorable sympathy.

It seems to me that, if the first ground is still the law

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of England, and apparently it is admitted by Wigmore to be, that a comment as to the second need not be considered, especially as that comment, though the view of the learned text writer, in no way changes the binding effect of the two decisions by Lord Mansfield and one by Baron Parke, which I have quoted.

The plaintiff's own testimony seems to me quite insufficient to prove more than that he believed he went through a marriage ceremony. It does not prove any of the requisites of the marriage ceremony according to the law of Hungary, and I take the effect of the above authorities to be that the law of Hungary, and compliance with that law, have both to be proved in this court as facts, to show that the marriage was an *actual* one.

Marriage depends on law as well as on the fact that the parties to it purported to marry. In trials for bigamy some judges have held (though there has been a great diversity of opinion on the point) that statements by the accused, of the fact of the first marriage, may be taken by juries to be sufficient proof of it as a legal marriage—at least when those statements were not made, as in *Reg.* v. *Duff* (*supra*) in the accused's own interest. It is cogently pointed out by Mr. Justice Barry, in *Reg.* v. *Griffin,* 4 L.R. Ir. 497, that, "if the admission be not evidence of a legal marriage, no man should be allowed to plead guilty to a charge of bigamy." Such decisions seem to me to be only arguable on the ground that, in an admission against his own interest, the accused should be presumed to know the law, or, perhaps that, in such a case, the moral guilt would be the same whether the first marriage was, or was not, a legal one, if the accused believed it to be according to law; that belief being implied from his admission.

But I fail to see how any such principle can apply to enable a plaintiff—seeking, in order to promote his own interest or advantage, to recover damages in an action

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for criminal conversation—to ask that, because he swears he went through what he believes to have been a marriage ceremony—the legality of which depends on foreign law, of which our Courts do not take judicial cognizance, but which, when a necessary element of a case before them, has to be proved as a fact—such proof should be held unnecessary and the legality of the foreign ceremony, as a marriage, taken for granted.

Some confusion has arisen from numerous dicta that, in criminal conversation, the proof must be the *same* as in bigamy. That may be correct in reference to proof in the ordinary way. But I think no judge has ever laid it down (or meant to do so) that in criminal conversation the mere statement, under oath or otherwise, by the plaintiff, that he had been married to the woman, should have the same effect, in proof of marriage, as an admission by the accused, in bigamy, might have as proof of guilt. I am unable, therefore, to see that judicial decisions as to the effect of such an admission are in any way applicable to this case.

Further, to hold that the plaintiff's uncorroborated testimony could be sufficient proof of the marriage would open the door for the bringing of actions by men who were not really married to the women they claimed were their wives, as suggested in *Morris* v. *Miller*. Wigmore seems to suggest that, because actions of this kind are less frequent than in Lord Mansfield's time, a less stringent rule of proof of the marriage should now prevail. I can not see the force of that argument. Though the volume of such actions has diminished, the need for protection from possible blackmail is, in each action brought, as great as ever.

As to the certificate, no attempt was made to show that the witness, who stated what he considered its meaning, was acquainted with the Hungarian law of marriage. There is nothing in the English or Manitoba

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Evidence Acts that makes such a certificate evidence by itself. In the absence of proof that the certificate was an extract from a register of marriages, properly kept according to the law of Hungary, and that such a certificate would, itself, be evidence of the marriage in the Courts of Hungary, it should, in my opinion, not have been admitted in evidence, or its effect read to the jury. I do not see that, if the witness had translated it verbatim, it would have made it any better in this respect.

The admissions in the defendant's letters cannot, because they are in writing, I think, stand on any better plane than if they were verbal admissions, and the case of *Morris* v. *Miller* shows that a verbal admission by the defendant that the woman was the plaintiff's wife is not proof of the fact in an action such as this.

I think the plaintiff has failed to meet the burden cast upon him in respect of proving the marriage, and would set aside the verdict and enter a nonsuit.

It is argued that the effect of such a view is to make it extremely difficult for a person, married in a foreign country, to procure the evidence of that marriage, because, although it might be proved by the issue of a commission, the plaintiff would perhaps be too poor to incur the expense of the issue of a commission. I can only understand that argument as meaning that otherwise necessary proof may be dispensed with where the party, on whom it lies to give that proof, is too poor to get it—a reason which, of course, cannot be maintained. Apart from that, however, I think that the assertion of such a ground overlooks entirely the effects which might result from the absence of such strict proof, and which are referred to by Lord Mansfield and Baron Parke in their judgments above quoted.

PERDUE, J.A. This is an action brought by the plaintiff against the defendant for criminal conversation with, and alienation of the affections of, the plaintiff's wife.

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The jury returned a verdict for the plaintiff and awarded him damages in the sum of $1,000. At the close of the plaintiff's case, defendant's counsel moved for a nonsuit upon the ground that the marriage of the plaintiff to his alleged wife had not been sufficiently proved. The motion was renewed at the close of the case. The defendant asks that a nonsuit be entered on this ground. He also takes the objection that the defendant's examination for discovery should not have been admitted in evidence against him on the ground that a defendant in a *crim. con.* action cannot be compelled to appear and be examined for discovery and, if he did so appear and was examined, his evidence given on such examination could not be used against him under 32 & 33 Vic. (Imp.) c. 68, s. 3, and on the authority of *Fleury* v. *Campbell,* 18 P.R. 110. In regard to this latter objection it appeared that the defendant was called at the trial as a witness in his own behalf and, on cross-examination, all the important parts of his examination on discovery were reiterated by him. I do not think that it is necessary to further consider this point, especially in the view I take in regard to the first objection.

Up to the close of the plaintiff's case the only proof of his marriage is contained in the following passage in his own evidence:

"Q. You came from where? A. From Moravia.
Q. You came from Moravia? A. Yes.
Q. Were you a married man? A. Yes, I was married in the old country.
Q. What place? A. Hungary, Budapest.
Q. You were married in the old country, in Hungary, Budapest? A. Yes.
Q. When? A. 17 years ago.
Q. By what ceremony? A. In the Court and in the Church.
Q. You were married in the old country in the church? A. Yes.

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Q. That is, you were in court, what is called a civil ceremony? A. Yes sir.

Q. And in the church? A. Yes sir.

Q. What church? A. The Roman Catholic, Budapest.

Q. That is the sacramental ceremony of marriage? A. Yes."

After the defence was closed the plaintiff's counsel tendered in evidence a document called a marriage certificate, purporting to certify to the marriage of the plaintiff and his wife. Defendant's counsel strongly objected to the reception of this document as evidence. One of the witnesses who understood the Hungarian language was recalled and, notwithstanding the objection of defendant's counsel, the witness gave to the jury a translation of the contents of the certificate and attempted to prove other facts in connection with it. This witness was an ordinary workman and made no pretence of having any special knowledge in regard to the certificate, beyond understanding the language in which it was written. It is not clear, from the shorthand writer's copy of the evidence furnished to this court, whether the document was filed as an exhibit or not. The court record contains no entry of it, and the document is not amongst the papers put in at the trial.

The certificate merely purported to have been issued from an office in Hungary. The authenticity of the certificate or of the records to which it referred was not proved, and there is no evidence that the certificate was issued under any lawful authority. Nothing was proved in regard to the certificate except what appeared on its face. It is clear that the certificate was not receivable in evidence: See *Lyell* v. *Kennedy*, 14 A.C. 437; *Finlay* v. *Finlay*, 31 L.J.N.S. Pro. & Mat. 149. The trial Judge should not have allowed a translation of it to be given to the jury. The only evidence of marriage, therefore, which was properly before the jury, was that which the

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plaintiff himself gave and which appears in the extract already quoted.

It has long been settled law that, in an action for criminal conversation with the plaintiff's wife, the plaintiff must prove an actual marriage whereby the relation of husband and wife was really created. In *Morris* v. *Miller*, 4 Burr. 2057, Lord Mansfield said:

"We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation and reputation are not sufficient to maintain this action. * * This is a sort of criminal action: there is no other way of punishing this crime at common law. It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the plaintiff himself."

In *Catherwood* v. *Caslon*, 13 M. & W. 261, also an action of the same nature, it was sought to prove a marriage between two British subjects alleged to have taken place in Syria. Both parties were members of the Church of England. The marriage was celebrated by an American missionary, according to the rites of the Church of England. The parties afterwards cohabited and lived together as man and wife. It was held that a marriage had not been proved because it had not been shown to have been celebrated in the presence of a priest in holy orders.

Parke, B., in giving judgment, said:

"Unless the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony, which the parties suppose to be sufficient to constitute that relation, is not enough."

These cases indicate that, in a *crim. con.* action, the fact that a marriage took place must be established with the same degree of certainty as would be required upon an indictment for bigamy. As to the proof required in the latter action, see *Reg.* v. *Smith*, 14 U.C.R. 565; *Reg.* v.

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Duff, 29 U.C.C.P. 255; *Roscoe's Crim. Ev.* 13th ed. p. 272.

In the present case the plaintiff and his alleged wife were citizens of a foreign country when the alleged marriage ceremony took place, which was said to have been performed in that country. Our law recognizes and holds valid a foreign marriage when it has been performed according to the rites or ceremonies held requisite by the law of the country where the marriage has taken place. Our courts give effect to the principle that the form of the contract is governed by the law of the place where the contract takes place: *Dicey, Con. of Laws,* 2nd ed. 615, 616. "The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted;" *Sottomayor* v. *De Barros,* 3 P. D. 1, 5; see also *Ogden* v. *Ogden,* [1908] P. 46. If then the plaintiff seeks to prove in a Court of law in Canada that he was in fact married in Hungary to the woman he calls his wife, both being domiciled in that country at the time, he must show that such marriage was performed according to the rites and ceremonies held requisite by Hungarian law. It is not sufficient for him to state merely that he was married "in the Court and in the Church." He must go further and show that his marriage was a valid one in Hungary.

It was argued that the defendant had in effect admitted the marriage by speaking of the woman as the wife of the plaintiff. But it is clear that he was referring to her general repute as such. He does not appear to have had any knowledge that the marriage took place in fact or that it was celebrated in legal form.

It is scarcely necessary to point out that, in ordinary civil actions, marriage may be presumed where the parties have lived together for a long period as man and wife and have been regarded and received as such: *Doe* v.

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Fleming, 4 Bing. 266; *Piers* v. *Piers,* 2 H.L.C. 331; *Sastry Velaider* v. *Sembecutty,* 6 A.C. 364; *Phipps* v. *Moore,* 5 U.C.R. 16. But on an indictment for bigamy, or in the *quasi* criminal action for damages against an alleged adulterer, such rule does not apply and a valid first marriage must be proved: see *Taylor on Evidence,* 10th ed., par. 172.

It only remains to be pointed out that section 30 of the Marriage Act, 1906, only applies to marriages heretofore or hereafter solemnized in this Province where the minister or other person who solemnized the marriage was not duly authorized, or where any of the requirements of the earlier sections of the Act had not been complied with, but the parties have been living together as man and wife. It does not attempt to make valid a marriage in a foreign country between citizens of that country.

I think the appeal should be allowed with costs. The verdict should be set aside, and a nonsuit entered with costs in the Court of King's Bench.

CAMERON, J.A. The plaintiff was married to his wife (who was living at the time the action was brought but died before the trial) at Budapest in Hungary in October, 1896, and lived and cohabited with her thereafter until they separated in consequence of the alleged wrongful conduct of the defendant, which is the subject of this action. The charge is that the defendant had illicit and adulterous relations with the plaintiff's wife for a long time prior to the separation. The defence denies generally the plaintiff's allegations, and specifically that stating his marriage.

The case was tried before Mr. Justice Macdonald and a jury on November 18, 1911, when a verdict was found for the plaintiff for $1,000. The judgment entered thereon is now moved against on the grounds (1) that the examination of the defendant was improperly admitted

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as evidence, and (2) that there was no evidence of the plaintiff's marriage as alleged. Objection was also taken to the amount of the damages awarded.

I cannot attach importance to the first ground of objection. The evidence in the examination was in its main features all brought out on the defendant's examination. A new trial could not be awarded on this ground.

The second ground is more formidable. Here the evidence intended to establish the marriage is that of the plaintiff himself, who swore that he was married in Budapesth in Hungary "in the Court and in the Church," that is by both a civil and a religious ceremony. He lived with his wife for sixteen years and they had a child, issue of the marriage, who died at the age of five years. There was also put in, in corroboration, a certificate, purporting to come from the Church authorities in Budapesth. To this objection was taken on various grounds, amongst them, that the provisions of the law relating to solemnization of marriage in Budapesth were not given in evidence. Plaintiff's counsel did not, however, rely upon this certificate, but upon the direct evidence of the marriage contained in the plaintiff's testimony.

It is urged that this proof is wholly insufficient. "If persons live together as man and wife, it will, in favor of morality and decency, be presumed that they are legally married." But to this rule there are in England two exceptions. "Both on an indictment for bigamy, and on a petition claiming damages against an alleged adulterer (which, under the Divorce Acts, has taken the place in England of the action for criminal conversation), a valid first marriage must be proved; and even the proof of a ceremony, which the parties supposed to be sufficient to constitute the relation of husband and wife, is not enough, unless it be shown to be legally valid:" *Taylor on Evidence,* sec. 172.

The special rule concerning evidence of marriage in

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actions for criminal conversation was first laid down by Lord Mansfield in *Morris* v. *Miller,* 4 Burr. 2057. There the man and woman "were married at Mayfair Chapel. The register or books could not be given in evidence. Keith, who married them, was transported; and the clerk, who was present, was dead. So that the plaintiff could not prove the actual marriage by any evidence." The plaintiff proved articles made after marriage; "also cohabitation, name and reception of her by everybody as his wife, though he did not indeed prove it by any register, or by witnesses who were present at the marriage." Evidence was also given of a confession by the defendant of adultery with plaintiff's wife. Lord Mansfield held: "In an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact: acknowledgment, cohabitation and reputation are not sufficient to maintain this action."

"But we do not at present define what may or may not be evidence of a marriage in fact."

In this decision Lord Mansfield himself made the law as he pointed out in the subsequent case of *Birt* v. *Barlow,* 1 Doug. 174. "But an action for criminal conversation has a mixture of penal prosecution: for which reason, and because it might be turned to bad purposes * * it struck me, in the case of *Morris* v. *Miller*, that in such an action, a marriage in fact must be proved." But he pointed out also that marriages are not always registered, where proof by register would be impossible and other proof would be admissible. Mr. Justice Blackstone says, at p. 171: "That the best proof that could be given of an actual marriage was by some person personally present at the solemnity."

In *Morris* v. *Miller,* as it is reported in Sir W. Blackstone's reports, at p. 632, Lord Mansfield's judgment is differently reported, thus: "In these actions there must be proof of a marriage in fact, as contrasted to cohabita-

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tion and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact; as by a person present at the wedding dinner, if the register be burnt and the parson and clerk are dead."

So that all that is necessary is proof of a "marriage in fact" or of an "actual marriage," which signifies "as a rule of evidence, in these decisions, proof of an eye witness, i.e., either by the register containing the parson's entry or by the oral testimony of parson, clerk or some other person present at the ceremony:" *Wigmore on Evidence*, sec. 2084. It is not laid down that there must be evidence of the validity of the marriage ceremony, but that there must be strong evidence of the marriage itself, more than mere evidence of cohabitation and reputation.

Now, in this case, we have the evidence of an eye witness, to wit: the plaintiff. His evidence would not have been admissible in England at the time when *Morris* v. *Miller* was decided (1767) or *Birt* v. *Barlow* (1779). The Common Law rule disqualifying parties to actions of this kind as witnesses remained in force until 1869 (32 & 33, Vic. c. 68). So that until then the question of proving a marriage by the evidence of a party could not arise.

I think it can be forcibly contended that the plaintiff's evidence in this case is strong evidence of the fact of his marriage; and, in fact, the best evidence within his power to give, and, therefore, it is sufficient to meet the requirements of defendant's counsel as set forth in *Morris* v. *Miller* (p. 2058), to which the Court there gave effect, although it refused to define what might or might not be evidence of a marriage in fact (p. 2059). But that best evidence (referred to in *Morris* v. *Miller*) certainly could not at the time of that decision be the evidence of one of the parties to the action and to the marriage under the Common Law rule, disqualifying parties as witnesses, then prevailing.

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The question is undoubtedly rendered more difficult by the decision of the Court of Exchequer in *Catherwood* v. *Caslon,* (1844) 13 M. & W. 261. The plaintiff there was an Englishman, domiciled in England, travelling in Syria, who married the daughter of the English Consul at Beyrout, he being twenty-one years of age and she under that age. The marriage was celebrated by an American Missionary according to the rites of the Church of England, of which both parties were members. Afterwards the parties cohabited as man and wife and had a son issue of the marriage.

The case was twice argued. On the first argument it was held that the marriage was invalid on the authority of *Reg.* v. *Millis,* 10 Cl. & F. 534, which case was decided by the House of Lords largely on the effect of the Marriage Act, 26 Geo. 2, c. 33. This judgment of the House of Lords was by a Court equally divided, and has been questioned by competent authority, to which I shall refer hereafter. In any event it was sufficient to justify the annulment of the Catherwood marriage on the ground that it was not celebrated in the presence of a priest in Episcopal Orders.

On the second argument it was contended that, the action being one of *crim. con.,* it was sufficient to show that the parties had gone through a solemn ceremony with the *bona fide* intention of contracting a valid marriage, and had subsequently cohabited. Baron Parke, delivering the judgment of the Court, held that, since *Morris* v. *Miller* and *Birt* v. *Barlow,* it was "necessary for the plaintiff to show what the Courts call a marriage in fact, which we think is an actual marriage, valid or avoidable and not yet avoided." Then he goes farther, in my humble opinion, than is justified by the cases relied upon by him as authorities when he says: "Unless the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed: and the mere proof of

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a ceremony which the parties suppose to be sufficient to constitute that relation, is not enough. It must be shown to be sufficient according to law for that purpose." He further goes on to point out that the supposed wife may have left the plaintiff and gone to cohabit with the defendant because she had discovered that the contract of marriage assumed to have been entered into at Beyrout was not binding on her.

I would point out that in the Catherwood case the marriage was invalid under *Reg.* v. *Millis,* which case, of disputed authority, was based upon provisions of the English Marriage Acts, wholly inapplicable here. The country in which Beyrout is was at the time Mahomedan in point of religion. Furthermore the parties in the Catherwood case were an Englishman and an Englishwoman, both domiciled at the time of the marriage in question in England and both were members of the Church of England. I do not imagine that Baron Parke intended his judgment to go any further than the facts of the case immediately before him warranted or necessitated. I certainly do not feel inclined to give it any wider application. To us to-day, and in this country, the decision in the Millis case appears to have inflicted a great wrong and would surely not now be held to be a binding authority.

As to that case, see the remarks of Lord Campbell in *Beamish* v. *Beamish,* 9 H.L.C. at 337, where he says that he deemed the decision that, unless a priest, especially ordained, was present at the ceremony, the marriage was null and void and the children thereof illegitimate, was so unsatisfactory that he resorted to the extraordinary expedient of entering a protest against it in the Journals of the House.

In *Manwaring's Case,* 1 Dearsly & Bell, 139, Mr. Justice Willes declared that the decision in *Catherwood* v. *Caslon* turned upon *Reg.* v. *Millis* "which I shall never consider as a binding authority."

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Here, at any rate, the facts are wholly different from those in the *Catherwood case*. We have no declaration of this or any other Court that the marriage here in question was invalid. On the contrary, practically the opposite is the case, in that there has not been the slightest attempt to question its validity here or abroad, and, in fact, the defendant admits it himself. The man and wife here were not Canadians or British subjects, but Hungarians. Their domicile, unquestionably, at the time of the marriage was not here but in Hungary, where they were living at the time and of which country they were citizens or subjects. The evidence is the best evidence in the plaintiff's power to give, and is more than evidence of "acknowledgment, cohabitation and reputation," for it goes back to the inception of the relation of husband and wife at and by a religious and a civil ceremony. The religious ceremony was performed in the Roman Catholic Church in Budapesth in Hungary, in which the Christian and not the Mahomedan faith prevails. Surely it is the part of common sense to say that a ceremony performed under these circumstances, in a civilized and Christian country, lived up to for sixteen years, and absolutely unquestioned, can and must be assumed to be regular and duly performed. I refer to Lord Ellenborough's dictum in *Rex* v. *Brampton*, 10 East, at p. 289, followed in *Reg.* v. *Griffin*, 4 L.R. Ir. 503.

If the plaintiff were to be held here to the strict performance of the very letter of the decision of Baron Parke, what would he have to prove? The law of Hungary relating to the solemnization of marriage? That would not be sufficient, for it would fail to show that the ceremony in question complied with the law, and that the officer or priest celebrating the ceremony acted in accordance therewith. The plaintiff would also need to prove the official character of the magistrate performing the civil ceremony sixteen years ago, and also, it may be, the

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due episcopal ordination of the priest celebrating the religious ceremony at the same time. And, in all this proposed proof, the impossibility of the magistrate or priest identifying this plaintiff and his wife (now dead) with the parties who participated in the ceremonies before them in Hungary is apparent. These same difficulties face us in supposing an attempt to prove the marriage by virtue of a certificate. That certificate would be useless without additional evidence establishing the law of Hungary and the identity of the ceremony vouched for by the certificate with that referred to by the plaintiff and here in question, and without evidence establishing the identity of the parties named in the certificate with the plaintiff and his wife.

Lord Mansfield said in *Morris* v. *Miller*, 1 W. Bl. 632, that in such cases there need not be strict proof from the register or by a person present, but that there must be strong evidence, and he went no further than that. There certainly is before us strong evidence, absolutely uncontradicted, of the actual marriage in this case in the testimony of the plaintiff himself, who, without the slightest attempt being made to impeach his evidence on the point, swears positively to the fact of his marriage. He regarded the woman as his lawful wife and she regarded him as her lawful husband. That is the unquestioned fact.

In addition to this we have the evidence of the defendant, who, throughout his relations with the plaintiff's wife, regarded her as his (the plaintiff's) wife, and speaks of her in that, and no other, way. The defendant says that the plaintiff's wife spoke to him of the plaintiff as her husband. That he regarded her as the plaintiff's lawful wife is incontrovertible. The correspondence referred to at p. 158 and put in at the trial also shows this as the defendant's view. His evidence throughout is, I take it, an admission that he knew and acknowledged the

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plaintiff's wife to be his (the plaintiff's) wife, and that the defendant regarded her in no other light, whatever may have been the nature of his relations with her.

My conclusion, therefore, is that the plaintiff's evidence on the subject of the marriage is evidence of a party to it, an eye witness, and is therefore evidence of a "marriage in fact," or "actual marriage" within the accepted meaning of the rule laid down by Lord Mansfield. Moreover, we have here the evidence of the defendant in corroboration, to which weight must be given. (See *Wigmore*, sec. 2086).

As for the rigid rule of proof laid down by Baron Parke, I would consider it inapplicable to this case for the reasons I have stated. To enforce that rule here or in cases like this would be simply a denial of the right to bring an action, as in practice it would be impossible to comply with it.

With reference to proof of marriage in bigamy cases, the decisions are collected in *Crankshaw's Criminal Code*, 338-341. "The fact of the marriage having been validly solemnized may be proved by some person who was actually present and saw the ceremony performed:" p. 340. In support of this the author cites *Reg.* v. *Allison*, R. & R. p. 109, and *Reg.* v. *Manwaring*, 1 Dears. & B. 132.

I cite also the case of *Reg.* v. *Newton*, 2 M. & Rob. 503, or *Reg.* v. *Simmonsto*, 1 C. & K. 164. In that case the prisoner, shortly after his return to England, had told his wife's sister of his marriage in New York by a Presbyterian clergyman and he had also referred to her as his wife on other occasions. It was left to the jury to say whether this was not sufficient evidence "that the marriage had been a valid one according to the law in force at New York." That is the important feature of that case as bearing upon the case now before us. The admission was held sufficient to establish not only the fact of the ceremony, but the validity of the ceremony according to the foreign law. This point is altogether apart from that of

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the obvious propriety of allowing evidence of an admission made by a party against his own interest, or from that that the defendant in a bigamy case, "in acknowledging marriage, speaks of the fact in which he was personally concerned, and of the truth of which he cannot possibly be ignorant," as said by Robinson, C.J., in *Campbell* v. *Carr*, 6 O.S. 484 (1843). The *Newton or Simmonsto* case goes farther than that, for it holds that the admission of a defendant is not only evidence against the defendant in a bigamy case, of the fact of the first marriage, but is also evidence of the foreign law.

In *Reg.* v. *Smith*, 14 U.C.R. 565, proof of the first marriage was given by the brother of the woman, both of whom were brought up in Upper Canada, and were apparently British subjects. The brother said he was present at his sister's marriage with the prisoner in the State of New York before a justice of the peace, "a magistrate having power to marry," and that the two lived thereafter as man and wife for a short time. The prisoner was found guilty and sentenced to three years in the penitentiary, but a case was reserved for the opinion of the Court as to the proof of the validity of the first marriage in the State of New York. The Court held that the evidence given by the brother, that the justice of the peace had power, was insufficient as it was "given by a person who never at any time, for all that appears, was a lawyer, or an inhabitant of the foreign country in question." The decision goes no further than that. In this present case the plaintiff made no statement as to the persons who officiated at his marriage, and I can find no authority requiring that he should do so. Moreover, the plaintiff was an inhabitant of the foreign country in question here, as also was his wife. I would not extend the decision in *Reg.* v. *Smith* in its application any further than required by the facts set forth. And it is to be borne in mind that the Court considered the question

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of evidence in the case of a prisoner already sentenced to three years in the petitentiary.

No doubt we must take Lord Mansfield's rule as binding. But we must remember the peculiar social conditions prevailing at the time the judgment was rendered, when, for reasons stated in *Wigmore*, sec. 2084, note, this particular form of action flourished and was naturally an attractive means of blackmail. These conditions no longer exist and, so far as the defendant in such actions is concerned, and the propriety of giving him any special protection, "it is doubtful whether there is any need of exercising special vigilance in behalf of a defendant whose conceded conduct deprives him of honorable sympathy:" *Ib.* 2084. It is on such grounds as these that I would place a liberal construction on Lord Mansfield's rule and would restrict the application of Baron Parke's judgment in the *Catherwood case* to cases similar in circumstances to that case.

Strong evidence must, it is true, be given in such a case as this of the actual marriage, something more than mere evidence of cohabitation and reputation. But, if this form of action is to be allowed at all, restrictions as to evidence, impossible to be complied with, should not be thrown in its way. The modern tendency is, in the interests of public justice, to relax the strictness of a rule of evidence which tends practically to block the plaintiff's right to recover. When the plaintiff has gone into the box, deposed positively as to his marriage, which is not impeached in the most indirect way or by the slightest evidence, when he has lived with his wife for sixteen years, and had issue by her, and where that relationship has been acknowledged by the public, and more particularly by the defendant, by his words and conduct, it does seem to me that strong and amply satisfactory evidence has been given of the fact of the marriage within the fair intent and meaning of Lord Mansfield's rule. I must admit that I have

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reached this conclusion not without some difficulty, but it seems to me justified by authority and by considerations of public interest.

Since writing the foregoing, I am referred to *Rex* v. *Naoum,* 24 O.L.R. 306 (1911), a judgment of the Ontario Court of Appeal, where it was held (on a case stated for the opinion of the Court upon an indictment for bigamy) that an admission of the accused, coupled with evidence of those present at the ceremony, was sufficient evidence of a marriage in Macedonia. It was held expressly that the testimony of these witnesses was not sufficient to prove the Macedonian law (per Maclaren, J.A., at p. 311). But the evidence, while not sufficient to prove the foreign law, was held to be not without weight. The various authorities dealing with the question as to the degree of weight, if any at all, that is to be attached to admissions in such cases are dealt with in Mr. Justice Maclaren's judgment. That such an admission, unsupported by other evidence, was sufficient was held by the Court of Appeal for Lower Canada in *Reg.* v. *Creamer,* 10 L.C.R. 404, and by the Supreme Court of the United States in *Miles* v. *United States,* 103 U.S. 304. I think the judgment of the Supreme Court, in expressly upholding (p. 311) the view set out in *Reg.* v. *Simmonsto* that "it is for the jury to determine whether what he (the accused) said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized," is entitled to great weight. A long list of cases is given in support of this view, including *Reg.* v. *Upton,* (1839); 1 *Russell on Crimes,* 983; *Reg.* v. *Newton or Simmonsto, supra.*

In the *Naoum case* the opposing decisions are referred to also; *Reg.* v. *Savage,* 13 Cox C. C. 178, and *Rex* v. *Lindsay,* 18 T.L.R. 761. The comment of Barry, J., in *Queen* v. *Griffin,* 4 L.R. Ir. 497, is instructive as to Lush, J.'s, statement in *Reg.* v. *Savage,* as also is his

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remark that, if an admission in bigamy be not evidence of marriage, "no man should be allowed to plead guilty to a charge of bigamy." (In this *Griffin case* the point was as to the proof of validity of the second marriage of the accused.)

The conclusion of the Court was that there was ample evidence, "if the Judge believed it, as he did, to support the conviction," though "it might have been well if the Macedonian law had been proved."

I consider this opinion of the Ontario Court of Appeal, concurred in by all the Judges, lends support to the view which has appealed to me in this present case.

The learned trial Judge stated expressly that the jury were to assume the marriage as a fact (p. 159), allowing the case to go to them on that assumption. After the jury brought in the verdict Mr. Howell said: "Your Lordship intimated that it would still be open to me to argue the question as to proof of the marriage, if we still saw fit?" And to this the learned trial Judge assented. It seems to me that this procedure, while perhaps unusual, was tantamount to allowing the case to go to the jury, reserving to the defendant the right to move to set aside the verdict on the ground of want of evidence, an arrangement to which the parties agreed.

I would not interfere with the damages awarded by the jury (which cannot be regarded as excessive in an action of this character) and think the motion to set aside the judgment entered must be refused with costs.

HAGGART, J. A. I agree with the conclusions arrived at by my brother Cameron, who in his reasons has fully reviewed the authorities.

The trial Judge apparently was not satisfied as to the sufficiency of the proof of the marriage and, in order to shorten matters, told the jury to assume that the parties were married; so the question is open, and that question is

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whether there is sufficient evidence of the plaintiff's marriage to support the verdict.

Rex v. *Naoum*, 24 O.L.R. 306, is a recent case in the Ontario Court of Appeal. The Court was unanimous and Mr. Justice Maclaren, who delivered the judgment of the Court, collected and reviewed the authorities. A case was stated by the County Court Judge before whom the defendant was tried for bigamy and convicted, and the question stated for the opinion of the Court was whether there was sufficient legal evidence of the first marriage, which took place in Macedonia, to warrant the conviction. The evidence upon which the accused was convicted was that of several witnesses who were present when the ceremony was performed; that the ceremony took place in the village Greek Church and was performed by the priest of that Church in the presence of the villagers gathered there to witness it, and that such ceremony was performed in the same manner and by the same officiating priest as and by whom weddings usually were performed in that village and (in so far as the witnesses were qualified to speak) according to the rites, laws and customs of that country. The evidence also showed that the prisoner and the woman with whom he went through the ceremony had lived together as man and wife and had two children born to them. There was also an admission made by the prisoner after his arrest. Mr. Justice Maclaren said that, if it were necessary to prove the Macedonian law as to marriage, he did not think the testimony of the witnesses would be sufficient for that purpose; and, while the evidence of the Macedonian witnesses was not sufficient to prove the foreign marriage, there was ample evidence, if the Judge believed it, to support the conviction.

Does our Marriage Act apply to the question before us? What object had our Legislature in view when it revised and amplified our statute respecting the solemnization of marriages?

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Before considering the wording of the Act, let us consider the law generally on this subject. "A cogent legal presumption is raised in favor of any marriage which is shown to be celebrated *de facto*. * * If persons live together as man and wife it will, in favor of morality and decency, be presumed that they are legally married:" *Taylor on Evidence,* 10th ed. par. 172. And text-writers put it stronger and state that the presumption of law must prevail unless broken in upon and is much stronger than any ordinary legal presumption. It is a presumption of law, not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

But this presumption of law in favor of marriage does not hold good under all circumstances. Two exceptions to this are recognized in England: On an indictment for bigamy and on a petition claiming damages against an alleged adulterer which latter is practically our present action for criminal conversation. A valid first marriage must be proved and even the proof to constitute the relation of husband and wife is not enough unless it be shown to be legally valid: *Taylor on Evidence,* 10th ed., par. 172; *Catherwood* v. *Caslon,* 13 M. & W. 261; *Morris* v. *Miller,* 4 Burr, 2057; *Birt* v. *Barlow,* 1 Doug. 171. The foregoing is a general statement of the law laid down in the text books.

Let us consider briefly the conditions existing in Manitoba today and at the time of the passing of the Marriage Act in 1906. Immigration to our country is invited and encouraged and thousands of families every year are coming from remote countries and primitive communities, and speaking different languages. It may be that more than one-half the marriage ceremonies of the residents of Manitoba were celebrated in the home land. Our Legislature, with a view of insuring immi-

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grants in the enjoyment of their marital rights and prompted by the same motives that gave rise to the legal presumptions in civil suits in favor of marriage, by special enactment gave the husband and wife, in cases where their matrimonial civil rights were concerned, a position at least as strong as that enjoyed under the legal presumptions in civil cases.

Let us examine our Marriage Act, c. 41, 1906.

The former statutes are consolidated and revised and three sections, namely 28, 29 and 30, are added. Sections 28 and 29 legalize marriages solemnized by certain clergymen, Salvation Army officers and Quakers, and they apply only to marriages solemnized "in this Province."

Now take section 30. Observe that the limiting words "in this Province" are designedly left out. It refers to "every marriage heretofore or hereafter solemnized." It evidently applies to the marriage of every person whose marital rights may be the subject of adjudication. The substance of the section is:

"30. Every marriage heretofore or hereafter solemnized between persons not under a legal disqualification to contract such marriages shall, after two years from the time of the solemnization thereof or upon the death of either of the parties before the expiry of such time, be deemed a valid marriage so far as respects the civil rights in this Province of the parties or their issue and in respect of all matters within the jurisdiction of the Legislature of Manitoba, notwithstanding the clergyman, minister or other person who solemnized the marriage was not duly authorized to solemnize marriages, and notwithstanding any irregularity or insufficiency in the proclamation of intention to intermarry, or in the dispensation thereof or in the issue of the license or notwithstanding the entire absence of either," &c., &c.

It has been contended that this section 30 applies only to marriages solemnized in this Province. Why were the words of limitation "in this Province" expressed in the former sections and deliberately left out of this? Take the example of a farmer just south of parallel 49 selling his farm and moving across the boundary and taking a farm in Canada and becoming a citizen. Can this enact-

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ment be invoked by his neighbor who was married in Manitoba and not by the naturalized American?

The Legislature recognized the difficulty of procuring evidence of marital contracts consummated in all quarters of the globe from all people speaking many different languages, and by this enactment determined to guarantee our naturalized citizens in the enjoyment of their marital rights.

This action concerns "the civil rights" in this Province of the plaintiff. The marriage is substantially legalized. You could not offer evidence of the non-qualification of the official, nor evidence of the irregularity or insufficiency of the proclamation, or in the dispensation, nor could you question the license or assert the absence of it. The statute practically covers all that constitutes the ceremony. You cannot even challenge the marriage for its invalidity. The statute gives the party a stronger position than he would have in a civil suit under the presumptions which could be rebutted or repelled.

The plaintiff has affirmatively proved the ceremony by an eye witness, cohabitation, living as man and wife for 16 years, the birth of issue, and the recognition by the defendant of the existence of the relationship of man and wife. This, I think, is sufficient evidence of the marriage.

If section 30 of the Marriage Act applies, then what was formerly a legal presumption has the qualities of a statutory right and covers this suit which is brought to enforce a civil right of the plaintiff.

The appeal should be dismissed.

The Court being equally divided, the appeal was dismissed without costs.

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IN THE COURT OF APPEAL.

CAIRNS v. BUFFET.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Principal and agent—Commission on sale of land—Procuring ready, willing and able purchaser—Liability of agent of vendor on agreement to share commission with another agent who introduces purchaser—Purchase from owner over the head of option holder.

The principle that a vendor of land may be liable to his agent for commission, when he sells to a party introduced by the agent on terms less advantageous to him than those on which the agent was instructed to procure a purchaser, has no application to a case where the defendant is himself only an agent who has agreed to share with the plaintiff the commission to be earned from the vendor in case of sale to a purchaser introduced by the plaintiff.

When the purchaser so introduced fails to agree with the vendor on the terms of the proposed purchase, no commission has been earned or can be payable.

In this case the vendors, defendant's principals, were only holders of an unexpired option of purchase from the owner, and the fact that the purchaser, after abortive negotiations with the option holders, dealt with the owner direct and purchased the property from him on other terms before the option had expired, was held not to entitle the plaintiff to recover anything from defendant on the special contract between them, or to show that the proposed purchaser had been ready and willing to purchase from the option holders on the terms specified.

DECIDED: 18th November, 1912.

Statement. COUNTY Court appeal.

Plaintiffs sued to recover commission on the sale of land.

Judge Paterson entered a judgment in plaintiffs' favour for $500.

Defendant appealed.

J. P. Foley for defendant, appellant, cited *Haffner* v. *Grundy*, 4 D.L.R. 530; 21 W.L.R. 460; *Whitcomb* v. *Dickinson*, 47 N.E.R. 426, and *Fraser* v. *Wyckoff*, 63 N.Y. 445.

A. E. Hoskin, K.C., for plaintiff, respondent, cited *Walker on Real Estate Agents*, 336; *Barthell* v *Peter*

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Argument.

60 N.W.R. 429; *Stratton* v. *Vachon,* 44 S.C.R. 395; *Milestone Land Co.* v. *Lucksinger,* 1 Sask. 61, and *Cronk* v. *Carman,* 2 O.W.N. 1027.

RICHARDS, J.A. Plaintiffs and defendant are real estate agents. The defendant, who was then known to the plaintiffs to be such an agent, asked them to get a purchaser for certain lands, at a price, and on terms, which were then stated; and agreed that, if they did so, he would give them half of $1,000, which other parties had agreed to pay him, as a commission, if he procured a purchaser at that price and on those terms.

The parties who had so employed the defendant were not the owners of the land, but held an unexpired option, under which they were entitled to buy the property at a price less than that at which they had placed it with the defendant.

The plaintiffs introduced Mr. Maddock as a purchaser. Mr. Maddock had negotiations with the option holders, and it is claimed by the plaintiffs that he and such holders came, on 21st December, to a definite verbal agreement of sale. By such alleged agreement Mr. Maddock was to purchase, and such holders to sell, the land for the price above named, but on less advantageous terms as to payment of the purchase money. Five days later, on 26th December, Mr. Maddock went to the registered owners, and bought the land directly from them, at the same price, but on terms which do not appear definitely in the evidence. No reason is given for this action on Mr. Maddock's part, except that he seems to have believed that the option holders could not make a good title.

The option was not to expire till some time in the then next month of January. No evidence was given as to the nature, or particulars, of the option, except as to the price per acre. Also, there was no evidence to shew that the option holders could not make title.

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Judgment.

RICHARDS, J.A.

The plaintiffs sued the defendant in the County Court of Winnipeg for $500, claiming that they had fulfilled their contract with the defendant by procuring, as the purchaser, Mr. Maddock, who, they alleged, had on 21st December been able, ready and willing to buy at the price named by defendant.

The learned trial Judge upheld the plaintiffs' contention and entered a judgment in their favour for $500 and costs. From that decision the defendant has appealed to this Court.

The defendant, when he contracted with the plaintiffs, was, to the plaintiffs' knowledge, not the owner of the land, or of any estate in it, or of any right which might be turned into such ownership, or estate. He was, as they knew, employed, under a special contract, to procure a purchaser ready and willing to buy at a certain price, and on certain terms, on the doing of which he was to be paid a fixed sum, which was less than the usual rate of commission that would be paid in connection with a sale of land for that price.

It seems to me that the defendant's contract with the plaintiffs was distinctly understood to be a special one, that, if they procured such a purchaser, as above, he would give them half of the $1,000 which the procuring of such purchaser would have enabled him to earn from the option holders. There is no evidence of any variation of that contract, or of any subsequent, or other, contract between plaintiffs and defendant. If I am right in that, I can not see how procuring a purchaser, who was willing to buy on any other terms, was a fulfilment by the plaintiffs of the contract on their part.

It is, however, urged by the plaintiffs that, if Mr. Maddock, after being introduced by the plaintiffs, agreed with the option holders on other terms of purchase for the same land, that would entitle the defendant to claim the $1,000 commission from those option holders, and the plaintiffs to claim their half from the defendant.

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It is not, I think, necessary to discuss that proposition. It seems to me that, even if tenable under some circumstances, as to which I express no opinion, it is quite untenable in the case of a restricted special and unchanged contract, such as was made between the plaintiffs and the defendant.

Vendors have often been held liable to agents, where they sell to parties introduced by those agents, on terms other than those on which the agents were instructed to procure purchasers. But that is on the ground that a vendor may not, after making such a sale and taking the benefit of the agents' services, refuse to pay for the benefit thus derived from those services. Because of the knowingly taking of such a benefit the law implies a contract to pay the agent for the services that brought about the benefit. Such a principle can surely have no application where the employer derived no benefit and was no party to the change of the terms of sale.

But there are fatal objections to the argument so advanced for the plaintiffs: Firstly, the evidence does not, on a careful perusal, shew that terms of sale were definitely agreed on between the option holders and Mr. Maddock; Secondly, if they were, the fact seems to be that Mr. Maddock, though making the agreement, was really neither ready nor willing to purchase. His unexplained action in buying directly from the registered owners, five days after his alleged agreement with the option holders, proves that conclusively.

With deference to the view taken by the learned trial Judge, I am, for the above reasons, of opinion that the plaintiffs' action must fail.

I would allow the appeal with costs. The judgment in the Court below should, I think, be set aside and judgment entered there for the defendant, with costs, including the usual counsel fee.

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PERDUE, J.A.

PERDUE, J.A. Messrs. Fraser Bender & Co. listed certain property with the defendant Claude Buffet, a real estate agent, to be sold on certain terms. In the event of Buffet procuring a purchaser on these terms he was to receive $1,000 commission. Buffet then went to the plaintiffs, who were also real estate agents, and asked them if they could procure a purchaser upon these terms, promising them one-half of his commission, that is to say, $500, if they were successful. Fraser Bender & Co. were introduced to the plaintiffs by Buffet and the plaintiffs knew that Fraser Bender & Co. were the owners of the property.

When Buffet first sought to interest the plaintiffs in the matter he communicated to them the terms upon which the land would be sold. These terms were contained in a written memorandum (Ex. 1), and there is no dispute that a purchaser, if procured at all, should be a purchaser upon these terms. This document shows that the price of the land was $160 an acre for a quarter section containing 160 acres; $6,000 in cash, $2,000 in three months, and the balance in four payments extending over four years.

The plaintiffs claim that they did succeed in procuring a purchaser, one Maddock, who was ready, willing and able to purchase the land on the terms offered and that Buffet is now liable to pay them the $500 as their commission.

On the plaintiffs' own showing the terms offered by Maddock, the intending purchaser, were $5,000 when the title was approved, $3,000 in six months and the balance in three equal consecutive annual instalments commencing on the 21st June, 1913.

This offer was never accepted by the defendant's principals, Fraser Bender & Co. On the day following the furnishing of these terms Maddock proposed the formation of a syndicate to deal with the land, in which

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syndicate Fraser Bender & Co. were to join. By this latter proposal the terms of purchase were still further varied, part of the purchase money, $534, was to be paid by a promissory note to F. Bender, and part, $2,666, was apparently to be paid by a share in the syndicate to that amount being allotted to Fraser Bender & Co.

Negotiations appear to have taken place between the parties extending over some days, but none of the proposals made by the plaintiffs or by Maddock directly to Fraser Bender & Co. was ever accepted by the latter and carried out.

When Maddock made the first offer, he sent with the offer a cheque for $1,000, as a deposit made upon that offer, but this $1,000 was returned at the request of Maddock's solicitors, they claiming that the title to the property was not good.

During the time these negotiations were going on Fraser Bender & Co. were not the real owners of the property, they having only an option which expired in a short time.

Some four or five days after Maddock made his proposal in regard to the formation of a syndicate he opened negotiations with the real owners, being the persons from whom Fraser Bender & Co. held an option, and five days after his proposal to form the syndicate he closed a purchase from the real owners, cutting out Fraser Bender & Co.

The evidence clearly shows that the plaintiffs never procured a purchaser who was ready, willing and able to buy in accordance with the written terms furnished by the defendant to them when he placed the matter before them. None of the offers made by Maddock or by the plaintiffs to the defendant's real principals, Fraser Bender & Co., were ever accepted by the latter, nor was there any agreement or concensus ever arrived at. The fact that Maddock afterwards bought the property from

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the real owners from whom Fraser Bender & Co. merely held an option cannot give the plaintiffs any cause for action against the defendant.

The appeal should be allowed with costs. The judgment in the County Court set aside and judgment entered for the defendant, with the usual counsel fee and County Court costs.

HOWELL, C.J.M., CAMERON, J.A., and HAGGART, J.A., concurred.

Appeal allowed.

IN THE COURT OF APPEAL.

HANDEL v. O'KELLY.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Vendor and purchaser—Rescission of contract—Abandonment—Laches—Time of the essence of the contract—Intent, proof of—Appeal from Judge's finding of fact.

A contract under seal may be validly rescinded in equity without an instrument under seal, and a contract of rescission may be inferred from acts of the parties amounting to an abandonment on one side and an acceptance of the abandonment on the other.

A purchaser of land under agreement of sale providing for payment by monthly instalments and that time should be of the essence of the contract, who, after defaulting in his payments, allows nearly four years to elapse without doing anything towards re-instating the contract, beyond urging the vendor to sell the property so that he could get back the money he had paid, or showing any intention to make further payments, should be held to have abandoned it. *Howe* v. *Smith*, (1884) 27 Ch. D. 95, followed.

In such a case when the vendor has accepted and acted on the abandonment by re-selling the property or otherwise, the original contract is at an end and the purchaser can recover neither damages as for a breach of it by the vendor refusing to accept a subsequent tender of the overdue amount, made only after an increase in the value of the property, nor the money he has paid. *Cornwall* v. *Henson*, [1900] 2 Ch. 298, distinguished.

Whether or not a purchaser has intended to abandon his purchase should be determined from the facts and circumstances in evidence and not from his own interested statements afterwards made.

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The Court reversed the trial Judge's finding of fact that the contract in question still subsisted; holding that the question of intention could be decided by a Court of review as well as by the trial Judge who had heard the witnesses. 1912

DECIDED: 18th November, 1912.

Statement

BY agreement dated 29th January, 1907, made between the plaintiff and defendants, the plaintiff agreed to buy from the defendants a lot, as per subdivision of part of Lot 26 D.G.S. St. James, for $1,000. The cash payment was $25, which was to be followed by three equal monthly payments of $20 each, to be again followed by 32 monthly payments of $10 each, and the balance at a later date.

The plaintiff continued making payments up to the 1st November, 1907, since which time he had paid nothing.

In October, 1911, the plaintiff caused to be tendered the defendants a sum apparently sufficient to pay up the whole balance of purchase money and interest. The defendants then refused to carry out the agreement on their part, and the plaintiff brought this action.

MATHERS, C.J.K.B., held the plaintiff guilty of such laches as would disentitle him to specific performance, but he held that the contract still existed, and gave the plaintiff judgment for damages, based on the then excess in value of the lot over the contract price.

Defendants appealed.

W. H. Trueman for defendants, appellants, cited *Hicks* v. *Laidlaw*, 22 M.R. 96; *Cornwall* v. *Henson*, [1899], 2 Ch. 710; [1900] 2 Ch. 298; *Labelle* v. *O'Connor*, 15 O.L.R. 519; *Whitla* v. *Riverview*, 19 M.R. 757, and *Webb* v. *Roberts*, 16 O.L.R. 279.

E. A. Conde and *W. W. Kennedy* for plaintiff, respondent, cited *Barlow* v. *Williams*, 16 M.R. 164; *Hipwell* v. *Knight*, 1 Y. & C. 415; *Elmore* v. *Pirrie*, 57 L.T.R. 333 and *Moodie* v. *Young*, 1 Alta. 337.

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RICHARDS, J.A.

RICHARDS, J.A. It is patent that the learned trial Judge believed the plaintiff and his witnesses rather than the defendants, and, in dealing with this case, I shall deal with it only as it appears from the evidence of the plaintiff's witnesses.

The learned trial Judge held, in effect, that there had been no abandonment or rescission of the contract; but, with every respect, it seems to me that that is merely a conclusion to be drawn from the evidence and, with regard to such a conclusion, this Court is at liberty to consider the matter as fully as a court of first instance might.

Reading the evidence it appears that this lot was bought for speculative purposes, and that the plaintiff expected to be able to sell it shortly after making the purchase. He listed it back with the defendants for sale, at the time of purchase. After 1st November, 1907, when the plaintiff ceased making payments, he did nothing whatever with regard to the property until about the summer of 1908. Then he went to the defendants' office and tried to get back the money which he had paid, and to get rid of the liability. He claimed, at this interview, that he had been led to make the purchase by misrepresentations. He made no promise to continue his payments apparently, but the defendants told him that they would be lenient with him, and tried to get him to continue his payments. He suggests, in parts of his evidence, that he agreed to do this, but the fact is that he did not go back to the defendants, or make any attempt whatever to continue his payments, and treated the matter as it would be treated by a person who had abandoned the contract.

At a later date, which the plaintiff fixes in the fall of 1910, but which the evidence of one of his witnesses, Mr. Levinson, seems to show conclusively was in the fall of 1909, the plaintiff met one of the defendants in

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RICHARDS, J.A.

the neighborhood of the lot in question, and again tried to get his money back. The defendant told him to go to the defendants' office and they would settle with him. This he did not do, but he got Mr. Levinson to go there on his behalf. Mr. Levinson interceded with one of the defendants, and was told that he did not recollect the matter, or to that effect, but that the defendants were not inclined to act harshly towards their purchasers, and that if the plaintiff would come in to the defendants' office, they would treat him leniently, provided he would go on making payments. Mr. Levinson reported this to the plaintiff, but the plaintiff never thereafter went near the defendants' office, and nothing further occurred until October, 1911, when, the property having advanced very considerably in value, the plaintiff caused the balance to be tendered, with the result mentioned.

The agreement contains a provision that time shall be strictly of the essence of the contract, and it seems to me it may well be argued that, with that in the agreement, non-payment at the times of payment would work a forfeiture at law in the nature of a penalty against which the equitable rules might relieve if the action were brought without laches. But the plaintiff in this case has been distinctly guilty of great laches. All that I can see that the defendants ever agreed to, as against this position, is that, if the plaintiff would come in they would endeavor to make a settlement with him, or would be easy with him on his terms of payment. But the plaintiff never so acted as to avail himself of this conditional privilege. He did not go to the defendants, or make any attempt whatever to re-instate the agreement.

But there is another way of looking at the matter. The plaintiff's evidence and that of his witness Mr. Downey seem to me to show beyond doubt that the plaintiff's efforts, in the interviews with the defendants, were not directed to re-instating the agreement, but rather to get-

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ting back the money which he had put in and, of course, any profits which, if there had been a resale on his behalf, would have been made on such resale. He had no intention of making further payments, or doing anything further than endeavoring to get out what money he had put in and the profits, if there might be any, in case of such resale.

The plaintiff was several times questioned as to what he wanted at these interviews. I quote from different places:

"Q. What you really wanted to get out of this was $157 wasn't it? A. I wanted to get my money back and if there was any profit I wanted that."

* * * * *

"Q. What you wanted then was to see if you could not get back all of that $157? A. I wanted to see what settlement we could come to . . . and that is just what I wanted to do about that.

"Q. You wanted him to sell the lot and let you have back your $157? A. Yes.

"Q. And if there was any profit you wanted that? A. Yes.

"Q. You made no offer to pay up the arrearages at that time? A. No."

There are other places in which similar evidence is given, but the above seems to me sufficient to quote.

I can only read such evidence, taken with the fact that, though twice invited to go to the defendants' office and endeavor to make some sort of arrangement for continuing the purchase, the plaintiff did not go, as meaning that the plaintiff had no intention whatever of paying anything further upon the lot, and that he intended to abandon the contract, in so far as further carrying it out went. It is true that he says he did not. But actions often speak more forcibly than words; and I think that principle applicable in this case.

The defendants evidently understood this to be the position and accepted it, because, about the middle of

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1909, they sold the lot to one Lawrence. They got the lot back from Lawrence afterwards, so that the sale to him only becomes material as showing what they understood was the position the plaintiff was taking.

Now I take it that a contract of rescission can, in effect, be made by one party to a contract abandoning it and the other accepting the abandonment, and that, I think, is what happened here, from the above facts, and it is no answer to say that, the contract being under seal, it could only be rescinded under seal. The rules of Equity apply, and in Equity it was not necessary to the validity of the rescission of a sealed document that such rescission should be effected by an instrument under seal.

Holding the above view, I am of opinion, with every deference, that the contract was ended before action, and before the tender of the money in October, 1911. It is not necessary that the parties should meet to make a contract of rescission. Such a contract may be implied from their acts.

I would, with every respect, set aside the judgment in favor of the plaintiff and enter judgment for the defendants.

As a result of the above holding the plaintiff would not be entitled to recover back the $157 paid. Mr. Trueman, however, on defendants' behalf, agreed that he would not stand upon his clients' rights in that respect, but would allow it to be ordered to be repaid.

In my opinion the judgment in the Court below should be set aside and judgment entered there for the defendants with costs, and the plaintiff should pay to the defendants their costs of this appeal. The $157 to be set off against such costs, or applied in reduction thereof.

PERDUE, J. A. The plaintiff has sued for specific performance of the contract and, in the alternative, for damages for breach of its provisions. The learned trial Judge found that the plaintiff had, by his laches, dis-

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entitled himself to specific performance, but awarded him damages against the defendants for their refusal to carry out the contract. The trial Judge found that the contract still subsisted and the defendants were not entitled to treat it as at an end.

The contract was one for sale of land, the purchase price being payable by the plaintiff in monthly instalments of $10 each, extending over a period of about three years, and a final payment of $595 on 28th January, 1910. The contract was dated 28th January, 1907. By an express term it was provided that "time shall be in every respect the essence of this agreement."

On the plaintiff's own showing, he made no payment or offer of payment of any part of the purchase money from November, 1907, until 27th October, 1911, on which latter date he tendered the sum of $1104 as the amount then due and unpaid. The total amount paid by the plaintiff was $157 on a purchase amounting to $1,000 and interest. The excuse he offers is that he saw the defendant Harrison in the summer of 1908 and told him he was hard up and that Harrison said it would be all right. Harrison, he states, at the same time undertook to re-sell the land. In the several interviews which the plaintiff had with the defendants or either of them his purpose was to get back the money he had paid. He showed no intention of paying any part of the arrears. The defendants showed an inclination to treat him leniently if he would make his payments, but I think it is clear that he had made up his mind not to part with any more of his money, so far as this transaction was concerned, and to get back, if he could, what he had already paid. The learned trial Judge has not found directly that the plaintiff intended to carry out the agreement, although his finding that the contract still subsisted might inferentially carry with it a finding as to such intention. The question of intention is one which can, I

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think, be found as well by a court of review as by a trial judge who heard the witnesses. Intention is a state of mind to be inferred from the facts proven in evidence. Although a party to a suit may, in a case like the present, give evidence of the intention he had in doing or abstaining from doing certain things, little reliance should be placed on that kind of testimony: *Phipson,* 4th ed. 49. The intention of the party should be elicited from his actions, from facts and circumstances which would aid in the solution of the question and from which his condition of mind might be inferred. It is from the facts and circumstances that the intention to abandon is to be discovered, not from the party's own interested statement afterwards made: See *Cyc.* vol. 1, p. 7.

After carefully perusing the evidence, I have, with great respect for the finding of the learned trial Judge, come to the conclusion that the plaintiff had no intention of carrying out the contract, that he had in fact abandoned it, and that he only sought to make the best terms he could in regard to getting back the money he had paid. When we find him allowing four years to elapse without paying anything upon the numerous instalments of purchase money, and the interest and taxes that became payable in the meantime, and failing to see the vendors and account for his delay, I think the reasonable conclusion is that he had made up his mind to pay no more and to relinquish the purchase. Even if the defendants were willing to condone his earlier defaults and waive the strict condition as to time, that waiver would only apply to instalments then overdue and not to those falling due at future dates: *Barclay* v. *Messenger,* 43 L.J.Ch. 449, 456.

I think the defendants were justified, under the circumstances, in treating the contract as having been abandoned by the plaintiff. We find in this case the essentials necessary to enable them to do so, that is to say,

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"acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract," per Cotton, L.J., in *Howe* v. *Smith*, 27 Ch.D. 89, 95. If the land, which he clearly appears to have bought as a speculation, had failed to increase in value, we may reasonably conclude that he would never have offered to complete the purchase. It was the increase in the value of the land which induced him, in my opinion, to re-assert a claim which he had already abandoned.

Counsel for defendants expressed, on the argument, their consent to a return of the money paid on account, so that no question arises as to the disposal to be made of it.

The appeal should be allowed with costs and the plaintiff's action dismissed with costs, the said sum of $157 to be set off against such costs.

CAMERON, J.A. The plaintiff (the purchaser) brings this action on an agreement dated January 28, 1907, for the sale by the defendants to the plaintiff of certain land for the sum of $1,000, payable $25 in cash and the balance partly ($380) in monthly instalments and partly in a lump sum ($595) on January 28, 1910, and asks, by way of relief, for specific performance of the agreement, or, alternatively, for damages and a return of the amounts paid. Up to November 1, 1907, the purchaser paid $157. Nothing further was paid by the plaintiff either on account of principal or interest or taxes. On October 27, 1911, the plaintiff tendered the defendants $1104 and a transfer under the Real Property Act, and, on refusal, brought this action on December 7 following. In the meantime the owners had built on and sold the premises.

The agreement contains an express covenant by the purchaser that he will pay the vendors the purchase price

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with interest on the days and times therein set forth, and concludes with the covenant that "time shall be in every respect the essence of this agreement."

There is also a provision in the agreement that interest shall be paid "on the said sum, or so much thereof as shall from time to time remain unpaid whether before or after the same becomes due," until the whole of the moneys payable are fully paid, and that interest on becoming overdue shall be treated as purchase money and bear interest. This would lead directly to the inference that the intention of the parties was that the purchaser might not be held to the *ipsissima verba* of the covenant as to time being the essence. There was obviously a contemplation that the payments, both of principal and interest, might be deferred beyond the dates fixed in the agreement. But on default in any payment of principal interest or otherwise under the agreement it is provided that "the whole purchase money shall become due and payable." This would be, of course, at the option of the vendors who in no way bind themselves to a postponement of any payments, or to divest themselves of any rights or powers accruing to them in the event of default. It is impossible, however, to see how the purchaser could acquire any rights by reason of the forbearance of the vendors in permitting payments to be deferred.

What is the effect of the express covenant making time of the essence? "Such an express stipulation will be noticed by the Court among other circumstances (including the subject matter of the contract) in considering the equity to relief against forfeiture:" *McCaul, Vendors & Purchasers,* p. 88. And this statement of the law is not inconsistent with the view that the Court may refuse to grant relief in cases of delay or negligence, or where the subject matter of the contract comes within certain well recognized classes. The real point to be decided is "whether the case is, *under all the*

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circumstances, one in which the Courts should exercise its power to grant relief against forfeiture or not," *Ib.* 89. The relief that the Court may give to the purchaser in default is similar to that given a mortgagor in the like case "unless the circumstances, such as great and persistent delay or the subject matter of the contract, make it inequitable to do so," *Ib.* 97.

Under the terms of the agreement, unless there are extrinsic countervailing considerations, it must certainly be taken that the purchaser has lost his equitable interest in the land, and it is impossible to see what claim he has for the return of moneys paid by him to the vendors which moneys became theirs lawfully, and are their property to-day. But what countervailing considerations are there which the plaintiff can in reason invoke? There is nothing in the terms of the contract as we have seen. The total payments made by the purchaser amounted to less than one-sixth of the purchase price (a circumstance which clearly distinguishes this case from that of *Cornwall* v. *Henson,* [1900] 2 Ch. 298) and four years were allowed to elapse after the last payment before the purchaser came forward and offered the amount of his payments in arrears. In those four years he had done nothing in payment of principal or interest or taxes, and the vendors in that time had changed their position. The fact is, the property has increased in value: hence the tender and this action. Under all these circumstances, it does not seem to me that such a case has been made out by the plaintiff that this Court should grant him relief.

If the agreement in question still subsists, the various covenants in it must subsist also, including that making time the essence, to which due weight must be given, as has been stated. "It is generally laid down that where time is of 'the essence of the contract' performance after such time will not be a performance of the contract, unless assented to by the other party:" *Cyc.* IX., 605.

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The extension of time for payment does . . . . . not affect the validity of or force of the agreement making time the essence: *Barclay* v. *Messenger,* 43 L.J.Ch. 486. Surely then it cannot be reasonably contended that the tender, made four years after the whole amounts, due and to become due, under the agreement, had become payable (which tender was absolutely refused), was a performance of the obligations of the purchaser entitling him to call upon the vendors for a conveyance. There are not here present the circumstances which would prompt the Court to grant relief to the plaintiff against the terms of a contract to which he is a party and in respect of which he is grossly in default.

There is no doubt that a party can effectually abandon his equitable rights to real property. The conclusion is plain from the decision in *Cornwall* v. *Henson,* [1900] 2 Ch. 298. In determining whether there has been an abandonment, the first and most important object of inquiry is to ascertain the intention—for there can be no abandonment without the intention to abandon. "Upon a question of abandonment, as upon a question of fraud, a wide range should be allowed as to evidence, as it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or circumstance from which any aid for the solution of the question can be derived." *Cyc.* I., 7. Was it not here really the intention of the purchaser to abandon his rights? Did not his request that the vendors should repay him the moneys he had paid under the contract, and from which he had irrevocably parted, involve necessarily the total abandonment of the contract under which he had made these payments? I would say that the answers to these questions must, on the evidence, be made in the affirmative and that there was on the purchaser's part an intention to abandon and an abandonment in fact.

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I submit this view as to there being an abandonment, not without some hesitation, as it is not in accord with the finding of the learned Chief Justice. Yet it seems to me a conclusion that can be fairly and reasonably drawn from those conversations, facts and circumstances set forth in the evidence which are not in dispute; that is to say, disregarding such an episode as the interview which the defendant Harrison said he had with the plaintiff, which interview the plaintiff denies. What the plaintiff really wanted from the vendors in the interviews he had with them was, as he states, on his cross-examination, to get his money back and to obtain, if he could, any profit there might be on a resale. This obviously involved his withdrawal from the original contract (so far as one party to a contract can withdraw from it), because the purchaser was then in arrears and his request for a return of his instalments paid was equivalent to a statement of his determination not to comply further with the terms of the agreement and of his intention to continue in default, which unwillingness and intention were further shown and accentuated by his complete cessation from making payments. What he said to the vendors was: "Let me have my $157. Let me have it out of a sale of the property, if you can sell it. But let me have it somehow. In any event, I am not going to pay up arrears nor am I going to meet future payments."

The vendors did not return nor agree to return the $157. But they said: "Very well, if you wish to throw your contract overboard, we shall not hold you to it." Looking at the uncontradicted evidence, this seems to me to have been the attitude of the purchaser on the one hand and that of the vendors on the other. How then is it possible to entertain this action?

Moreover, looking at the circumstances attending this transaction from a different standpoint, it would seem to me that there can be inferred, from the facts arising after

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the plaintiff had ceased to make his payments and not in dispute, the creation of another subsequent contract between the parties. After the plaintiff had ceased to make his payments on the original agreement, and after he had failed to avail himself of the extension of time granted by the vendors, there arose in his mind an intention to disregard the agreement and throw it aside, in fact, to cancel it, which intention was communicated to the vendors by his refusal to make subsequent payments and otherwise, and in this intention, so declared and expressed, the vendors acquiesced. They built upon the property, disposed of it to a purchaser, and otherwise treated the agreement as wholly determined. That is to say, there arose a new agreement between the parties, to be gathered from their acts, words and conduct, an agreement to the effect that the original agreement should be disregarded, and, in fact, discharged and rescinded. And in this Court such a parol agreement to discharge a contract under seal, once established by evidence, is perfectly valid.

As for the plaintiff's claim to be repaid the amounts paid by him on the agreement, it would seem singular if he could, by his own default, put himself in a position to recover these from the vendors, who lawfully own them. But Mr. Trueman expressed a willingness to pay these over, and there is no necessity to consider this aspect of the case.

HOWELL, C.J.M., and HAGGART, J.A., concurred.

Appeal allowed.
Action dismissed.

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IN THE COURT OF APPEAL.

WINNIPEG STEEL GRANARY & CULVERT CO.

v.

CANADA INGOT IRON CULVERT CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, J.J.A.

Libel—Privileged communication—Malice—Fair comment—Judge's charge to jury—New trial—Criminal Code, s, 161—Secret Commissions Act, 1909—Municipal officers taking commissions on sales to their municipalities.

The plaintiffs, manufacturers of corrugated steel plate culverts used chiefly by municipalities, having sent to various municipal officers a circular pointing out that the law prohibited the payment of any commission direct to such officers on future sales of goods to the municipalities and suggesting that the recipient of the circular should select some business associate or friend to act as agent for the plaintiffs for future sales of these goods on commission, the defendants, rival manufacturers of the same articles, mailed to a large number of municipal officers copies of that circular accompanied by a criticism, headed "Bribery ! Bribery !! Bribery !!! " pointing out the dishonesty of the acts suggested by the plaintiffs' circular and the unfairness of the competition and characterizing such acts as "graft."

Plaintiffs claimed damages for the alleged libel, and had a verdict for $2000.

Held, per HOWELL, C.J.M., RICHARDS, PERDUE and HAGGART, JJ.A., that the defendants' circular was *prima facie* privileged, and that the trial Judge should have so told the jury and should also have instructed them that the onus was upon the plaintiffs to prove express malice to defeat the privilege, and that there should be a new trial because of such non-directions.

Clark v. Molyneux, (1877) 3 Q. B. D. 247, and *Spill v. Maule*, (1869) L. R. 4 Ex. 236, followed.

Appeal allowed with costs in the cause to the defendants in any event—Costs of the new trial to be costs in the cause.

Per CAMERON, J.A. Without considering whether the defendant's circular was privileged or not, there should be a new trial on the issue whether or not it was a fair comment without malice on a matter of public interest, and that the trial Judge should have submitted the question of malice to the jury and should also have charged them that the taking of renumeration by municipal officers from persons having transactions with the municipalities was not only forbidden by the Criminal Code and by the law prior thereto, but was also essentially fraudulent and dishonest, also that the fact that any such taking of remuneration was known to any or all of the members of a council could make no difference in the criminal, civil or moral liability of the parties to it.

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In the event of a new trial, evidence of such knowledge should be rigorously excluded as irrelevant.

Thomas v. Bradburg, [1906] 2 K.B. 627; and *Plymouth Mutual v. Traders' Publishing Association*, [1906] 1 K.B. 403, followed.

DECIDED: 18th November, 1912.

Statement.

THE plaintiffs in this case were manufacturers of corrugated steel plate culverts, which were practically only used by and sold to municipalities, to be used in the construction of culverts across the highways. The defendants were also manufacturers of the same articles. The plaintiffs had been carrying on this business for some time, and in January, 1912, issued a circular and sent it to Municipal Secretary-Treasurers and Reeves and Councillors, in various parts of this and the adjoining Provinces of Saskatchewan and Alberta. The circular was in the following language:

"Agreements are subject to accidents, fire, strikes, or other causes beyond our control."

"WINNIPEG STEEL GRANARY AND CULVERT CO., LTD.
Sheet Metal Manufacturers.
St. Boniface and Regina.

St. Boniface, Man.
Jan. 27th, 1912.

Dear Sir:—

At a recent meeting of our directors it was decided, owing to recent legislation, to renew no contracts direct with any Secretary-Treasurer or Councillor of any Municipality.

We are absolutely prohibited from paying any commission direct to you for any future sales made to your Municipality, and the law is as emphatic in regard to you not taking any commission.

We are enclosing two contracts. We would ask you to have the same signed by a business associate or friend who is prepared to represent us.

We are leaving to you the selection of this agent which we trust will be satisfactory to you. Have contracts signed, witnessed, and returned to us.

Thanking you for past favors, and wishing you a Prosperous New Year.

We are,
Yours very truly,
WINNIPEG STEEL GRANARY AND CULVERT CO., LTD.
W. H. HAMILTON."

This circular in some way came to the knowledge of

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the officers of the defendants and they wrote what might be called a criticism of the circular, attaching to that criticism a copy of the circular, and mailed all this to Secretary-Treasurers and Councillors of Municipalities in this and the adjoining Provinces. This criticism or document is the subject of this action of libel.

In their criticism of the plaintiffs' circular, they headed it with "Bribery! Bribery!! Bribery!!!" and in their comments they called the attention of the readers to the difficulty that an honest rival would have in competing with one who used such a circular or did the acts which the circular suggests, and in the course of the alleged libellous document was the following statement:

"Let it be recorded that hundreds of honorable Secretary-Treasurers and Councillors in Western Canada have spurned the graft. Remember the name of the Company."

The case was tried before Prendergast, J., and a special jury, when a verdict was entered for plaintiffs for $2,000.

Defendants appealed.

C. P. Wilson, K.C., for defendants, appellants, cited *Paris* v. *Levy*, 9 C.B.N.S. 342; *McGuire* v. *Western Morning News Co.*, [1903] 2 K.B. 100; *Dakhyl* v. *Labouchere*, [1908] 2 K.B. 325; *Hunt* v. *Star*, [1908] 2 K.B. 309; *Mogul Steamship Co.* v. *McGregor*, [1892] A.C. 25; *Thomas* v. *Bradbury*, [1906] 2 K.B. 627.

H. Phillips and *C. S. A. Rogers* for plaintiffs, respondents, cited *Thomas* v. *Bradbury*, [1906] 2 K.B. 627; *Digby* v. *Financial News*, [1907] 1 K.B. 502; *Citizens' Ins. Co.* v. *Brown*, [1904] A.C. 432; *Cooney* v. *Edeveain*, 14 T.L.R. 34; *Plymouth* v. *Traders*, [1906] 1 K.B. 403; *McGuire* v. *Western Morning News Co.*, [1903] 2 K.B. 100; *Monro* v. *Quigley*, 30 N.S.R. 367; *Sydney Post* v. *Kendall*, 43 S.C.R. 461; *Patterson* v. *Plaindealer Co.*, 2 Alta. 29; *Peter*

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Walker v. *Hodgson*, [1909] 1 K.B. 239; *Joynt* v. *Cycle Trade Co.*, [1904] 2 K.B. 297; *Street* v. *Licensed Victuallers' Society*, 22 W.R. 553; *Stevens* v. *Sampson*, 5 Ex. D. 53; *Wason* v. *Walter*, L.R. 4 Q.B. 73; *Cooper* v. *Lawson*, 8 A. & E. 746; *O'Brien* v. *Mar. of Salisbury*, 6 T.L.R. 137; *Davis* v. *Shepstone*, 11 A.C. 187; *Merivale* v. *Carson*, 20 Q.B.D. 275; *Hunt* v. *Star*, [1908] 2 K.B. 309, and *Newcastle* v. *Broxtowe*, 4 B. & Ad. 273.

HOWELL, C.J.M. No one can read the plaintiffs' circular without coming to the irresistible conclusion that in the past the plaintiffs had contracts "direct" with secretary-treasurers and councillors for the sale of goods to the municipalities of which they were officers, and paid those officers a commission on such sales and, further, that they proposed to continue that same practice in the future "indirectly"; and to do that indirectly it was in the circular proposed that a friend or business associate of such officer should be the agent and receive the commission.

It certainly looks to me as if the attention of the plaintiffs had been called to section 161 of the Criminal Code, and that they proposed still to act in violation of that Code by hereafter doing it "indirectly."

Quite aside from the Criminal Code, one would think that the plaintiffs might hesitate in sending such a circular as that on the grounds of common honesty. A great deal was said, apparently, at the trial, and a good deal was argued before this Court, that what both parties intended to refer to in this matter was the Secret Commissions Act, 1909; but it seems to me it makes little difference in my view of the case what particular statute the parties had in view. The defendants find their business interests imperilled by the unlawful acts of a rival and seek to call the attention of their common customers to the astonishing statements in the plaintiffs' circular.

At the trial it does not seem clear whether the learned

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Judge ruled on the question of privilege or not. I have no doubt, as a matter of law, that the defendants, in the conduct of their business, and in the pushing and protection of their trade, had a right to comment to municipalities who might be their customers upon this extraordinary circular of the plaintiffs.

"The defendant is entitled to defend his interests and any communication is privileged which a due regard to his own interests renders necessary:" *Odgers,* 273.

This question is fully discussed and taken for granted in *Hill* v. *Durham,* 86 N.Y. (79 Hun.) 336, and many English cases carry out the principles laid down in *Odgers.*

I think the learned Judge should have told the jury at the trial that the sending of that circular was within the defendants' privilege and he should have then distinctly told them that it was upon the plaintiffs to prove express malice.

If the occasion is privileged, then, to make it libellous, there must be actual, not legal, malice—"that which is popularly called malice": *Clark* v. *Molyneux,* 3 Q.B.D. 247.

If the defendants' officer, in the discharge of his duties, stated what was untrue, knowing it to be untrue, that would, of course, be evidence of malice. Express malice may be proved in two ways: (1) by inferences to be drawn from the excessive language of the document itself; and (2) by recklessly stating what was untrue, or stating that which he knew to be untrue.

If the occasion is privileged, and there is evidence to go to the jury on the question of malice, then, if the jury simply find that the statement was in excess of the privilege only, there must be judgment for the defendants. In order to justify a verdict for the plaintiff they must expressly find malice, and a mere excess of privilege is not necessarily evidence of malice.

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In other words, the occasion being privileged, the presumption is in favor of the absence of malice, and it is upon the plaintiff to prove actual malice: *Spill* v. *Maule*, L.R. 4 Ex. 236.

It was for the Judge to say whether the occasion was privileged or not, and, as it is for the Judge to say whether a document might be held to be libellous on its face, so it is for him to say whether the alleged libellous article was to such an extent excessive that it might be held by the jury to be in excess of the privilege: *McQuire* v. *Western*, [1903] 2 K.B. at 111.

If they so find, it might be evidence of malice so as to defeat the defence of privilege.

At the trial the learned Judge left certain questions to the jury, but intimated to them that they need not answer them unless they chose. Amongst the questions the fourth one was in the following language: "If the defendants' circular was false or malicious, assess the damages."

That question cannot be a proper statement of the law. If the circular was true and malicious there must be a verdict for the defendants because, if true, the plaintiffs cannot recover, no matter what amount of malice may exist.

I think the jury in this case should have been instructed upon the lines above set out. I think they should clearly have been told that the defendants, in their business interests, were justified in meeting the plaintiffs' peculiar, and I think I might say unlawful, circular, and further they should have been told that, in this case, it was upon the plaintiffs to prove express malice, and that malice is not to be presumed against the defendants when the occasion is privileged, and must be proved either by extrinsic evidence or by inference from the excess of their statements.

I confess it seems to me that the defendants'

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statements were not excessive, and that the plaintiffs have no fault to find with the defendants' criticism of their astonishing circular. But, without deciding this question, and without deciding whether the case should have been withdrawn from the jury, I think it is expedient, in this case, to grant a new trial for the reasons, amongst others, set out in *Clark* v. *Molyneux*.

The appeal is allowed with costs to be costs in the cause to the defendants in any event of the cause. The judgment is set aside and a new trial granted, the costs of the trial to be costs in the cause.

CAMERON, J.A. Everyone has a right to comment on matters of public interest provided he does so fairly and honestly and such comment, however severe, is not actionable. It has been said that fair and honest criticism on public matters is privileged. See *Henwood* v. *Harrison*, L.R. 7 C.P. 606. This does not mean that the words have been published on a "privileged occasion." "There is, it is true, a close analogy between the two defences of 'fair comment' and 'privilege': yet they are not identical:" *Odgers on Libel & Slander* at p. 194, referring to Lord Esher's statement in *Merivale* v. *Carson*, 20 Q.B.D. at p. 280, where the distinction is set out with great clearness.

It has been said that a fair comment on a matter of public interest is no libel. This, however, does not mean that the words are not defamatory: *i.e.*, not injurious to the reputation. If they were not defamatory, of course no action would lie. It is only when the words do tend to injure the reputation that the question arises: Can they be excused as being a fair comment on a matter of public interest? The words may be in themselves libellous, but as soon as they are shewn to be a fair and *bona fide* comment on a matter of public interest they cease to be actionable: *Odgers, Ib.* "It is precisely where the criticism would otherwise be actionable as a libel that

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the defence of fair comment comes in," per Lord Loreburn in *Dakhyl* v. *Labouchere,* [1908] 2 K.B. 327.

Plaintiff's counsel takes the ground that, even if the defendant's comments on the plaintiff's circular letter, which comments are the subject of this action, are held to be fair comment upon a matter of public interest, that defence cannot avail the defendants in this case inasmuch as it was alleged and proved that the comments were published maliciously. This is an important question not yet apparently passed upon in any Canadian Court.

It is stated in *Odgers* that the defence of fair comment will fail if it be not a comment published without malice, p. 196. I refer to the further remarks in *Odgers* on this subject at p. 224, under the caption "The comment must not be published maliciously."

"For a long time it was doubtful whether malice was is issue when a plea of fair comment was set up. . . . But it has now been clearly laid down in *Thomas* v. *Bradbury, Agnew & Co.,* [1906] 2 K.B. 627, 75 L.J.K.B. 726, 95 L.T. 23, that a plea of fair comment will not avail a defendant who is proved to have acted maliciously. The onus of proving malice is on the plaintiff, and any facts that would go to show malice, were the defence one of ordinary privilege, may be proved to rebut a defence of fair comment (*Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Ass.,* [1906] 1 K.B. 403; 75 L.J.K.B. 259; 94 L.T. 258), or it may be inferred from the terms of the articles itself.'" (*Per* Collins, M.R., in *Thomas* v. *Bradbury, Agnew & Co., supra,* at p. 637.) These cases have established the view which had been less clearly indicated in *McQuire* v. *Western Morning News Co.,* [1903] 2 K.B. 100; 72 L.J.K.B. 612; 51 W.R. 689; 88 L.T.757; and *Caryll* v. *Daily Mail Publishing Co.,* (1904) 90 L.T. 307. If the right to publish a fair comment on a matter of public interest is misused to gratify any indirect motive, the malice thus shown destroys the defence.

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The head note to the report of *Thomas* v. *Bradbury* states the effect of the decision thus:

"In an action of libel, where the defence is that the writing complained of is fair comment upon a matter of public interest, evidence that the defendant was actuated by malice towards the plaintiff is admissible upon the ground that comment which is actuated by malice cannot be deemed fair on the part of the person who makes it, and, therefore, proof of malice may take a criticism that is *prima facie* fair outside the limits of fair comment."

The Master of the Rolls in delivering the judgment of the Court, said at p. 640, "Proof of malice may take a criticism, *prima facie* fair, outside the right of fair comment, just as it takes a communication, *prima facie* privileged, outside the privilege." For, if it did not, "an action based on a criticism is wholly outside the ordinary law of libel, of which malice, express or implied, has always been considered to be the gist," p. 638.

"It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment." p. 642. And the opinion was, as stated in the head note, that evidence of malice actuating the defendant was admissible.

In the discussion of this case defendants' counsel drew attention to, and emphasized, the word "distorted" used by the Master of the Rolls in his judgment at p. 638, and also at 642, where he states that "Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it." But the language used in that case was defamatory: it must have been, or it would not have been held actionable. There can be comment entirely fair and not actionable. There can also be comment which is defamatory and therefore actionable *per se*, except where the defence of fair comment is raised. In Lord Collins' judgment the words "Comment distorted by malice" mean, to my mind, "Comment defamatory in

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its nature owing its expression to malice," or, "defamatory comment dictated by malice," and is so interpreted in the head note where "actuated" is used. Certainly, if the comment were not defamatory, and therefore not actionable, it would be immaterial whether it were dictated by malice or not.

Bower, in his work on *Actionable Defamation,* in discussing this subject, says:

"Just as fraud, if pleaded and proved, annuls every obligation, whatever be the nature of the contract or transaction creating that obligation, so malice, if pleaded and proved, annuls *prima facie* protection, whatever be the nature of the publication to which that protection is, in the first instance, accorded:" *Bower,* p. 155. And no distinction in this respect is drawn between the defences of comment or duty and interest.

"That 'comment' is as much a case * * of the *genus* defeasible immunity as any of the communications usually described as 'qualifiedly privileged' is now well settled by *Thomas* v. *Bradbury,* if it can be said to have ever been really in doubt," *Ib.* p. 364.

"The *prima facie* protection accorded to 'fair and accurate reports of proceedings,' and to fair comment, is as much liable to be displaced by proof of an evil motive on the part of the person publishing, as any other kind of defeasible immunity. The former branch of the proposition was not definitely established until 1879, nor the latter until 1906," *Ib.* 413.

In neither case is the immunity absolute. The absolute immunity of fair comment was not even argued by counsel in *Thomas* v. *Bradbury.*

The doctrine that the defence of fair comment can be destroyed by evidence that shows malice on the part of the defendant (or, in other words, that the defendant's state of mind has something to do with the case) has

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not been free from criticism. In the articles on Libel and Slander in *Halsbury's Laws of England,* contributed by Lord Justice Vaughan Williams and Mr. A. Romer Macklin, Vol. XVIII. at p. 707, it is said: "Assuming that the comment is a comment on a matter of public interest and that it is founded on facts which are not mis-stated, and is a fair comment in the sense that it is a reasonable inference from those facts, it is not easy to explain satisfactorily why the state of the defendant's mind at the time when he made the comment should affect the defence." This is an obvious commentary on the doctrine. And yet it may be, on the whole, a wise provision of the law which holds that A, if he be actuated by malice towards B, must refrain from using defamatory language about him. If he does, he does so at his peril, because the plea of "comment" will avail him nothing and, in these circumstances, a policy of silence and self-restraint is most expedient.

"It has been said that, given the existence of malice, it is for the jury to say whether it has warped the judgment of the critic: that comment distorted by malice cannot be fair on the part of the person who makes it: and that, therefore, evidence of malice actuating the defendant is admissible and should be left to the jury." In support of this is quoted *Thomas* v. *Bradbury,* and in the note attention is called to the word "actuated" used in the head note to that case compared with "distorted" as used in the body of the report.

As to the analogy between the defences of qualified privilege and fair comment it is pointed out in *Plymouth Mutual* v. *Traders' Publishing Association,* [1906] 1 K.B. 403, by Vaughan Williams, L.J., referring to *White* v. *Credit Reform,* [1905] 1 K.B. 653, and quoted by Collins, M.R., in *Thomas* v. *Bradbury* at p. 642, that "in both cases the question raised is really as to the state of mind of the defendant when he published the alleged

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libel, the question being, in the one case, whether he published it in the spirit of malice, in the other case, whether he published it in the spirit of unfairness."

"A statement made on a qualified privileged occasion from feelings of spite or from some other wrongful and indirect motive is an abuse of the privilege and is not protected though there be no intrinsic evidence of actual malice in the actual words used. So, too, it may be said that the existence of malice in the mind of a commentator at the time of the publication of the comment suggests that the comment may not really have been made in the exercise of the right of fair comment on a matter of public interest, but to gratify personal spite; or, in other words, may have been an abuse of the right, though the words used are not intrinsically unfair. In short, the abuse, whether of the right of comment or of a qualified privileged occasion, arising from a wrong state of mind actuating the publication may avoid the defence of fair comment or privilege, though the language used is not intrinsically unfair in the one case nor in excess of the occasion in the other. The analogy, however, is far from close. The burden is on the plaintiff, by proving express malice, to rebut the protection *prima facie* arising if words are spoken or written on a privileged occasion; whereas, on a defence of fair comment, the burden is on the defendant to show that the comment is fair and in so doing to negative the writing or publication of the comment being actuated by an unfair state of mind."

Halsbury's Laws of England, Vol. XVIII, p. 707, sec. 1291.

But the result, in the opinion of the authors, is this: "Whatever be the ground, it is clear that, on the defence of fair comment or criticism, evidence that the defendant was *actuated* by malice towards the plaintiff is admissible and that proof of malice may take a comment or criticism that is *prima facie* fair outside the limits of fair comment," p. 708. See also note (n) where reference is made to the passage from the judgment of Fletcher Moulton, L.J., in *Plymouth Mutual* v. *Traders' Publishing Association, supra,* at p. 418, quoted by Collins, M.R., in *Thomas* v. *Bradbury,* p. 642. "I am clear that in both cases . . . (privilege and fair comment) . . . the state of mind of the defendant when he published the alleged libel is a matter directly in issue."

Evidence of malice, therefore, will destroy the defence that the alleged libel is a fair comment on a matter of

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public interest: *Odgers,* 342. "Any indirect motive, other than a sense of duty, is what the law calls 'malice'," (per Lord Campbell, C.J., in *Dickson* v. *Earl of Wilton,* 1 F. & F. 427). The question of malice or no malice is for the jury. But there is always the prior question: Is there any evidence of malice to go to the jury? and this is for the Judge: *Odgers,* 346.

In *Thomas* v. *Bradbury* it was urged for the plaintiff that there was extrinsic evidence of malice (the particulars of which are set out in Lord Collins' judgment at p. 637) and also that the language of the article complained of could be looked at for intrinsic evidence. In this case before us the plaintiff's counsel dwelt upon certain matters in the evidence which, in his opinion, are such as the jury might consider as going to show malice.

The evidence of the defendants' president was referred to in several places as indicating an indirect motive. At one place the following question and answer were given:

"Q. Do you think this company or its officers ought to be in gaol? A. I think so, yes, emphatically."

And it would seem that even the demeanor of a party in the witness box is an element for consideration (*Thomas* v. *Bradbury, supra,* 637). It was also claimed that the wording of the comments was excessive in its imputations of past offences, and of the intention to commit further offences, and that facts are imputed not to be found in the circular. Stress was also laid on the anonymity of the defendants' publication, and on the large circulation given to it, in excess of that given the plaintiffs' circular.

It is argued that the trial Judge should have held, and that this Court now should hold, that the defendants' publication is a comment which is an honest expression of their opinion, and does not go beyond the limits of what may be fairly called criticism; that there was nothing in

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the publication beyond such a comment; that there was nothing for a jury to consider, and that there should, therefore, be a verdict for the defendants. This was what was done in the *McQuire* case by the Court of Appeal. But in that case "it was not suggested that there was any evidence of actual malice, there was no personal imputation, nor could any statement of fact be impugned"; p. 108. But, supposing the trial Judge had declared his intention of so holding on the pleadings, plaintiffs' counsel would, no doubt, have said: "We propose submitting evidence which will show these defendants cannot take advantage of that position because in their publication they were actuated by actual malice." Then it would have been impossible, I submit, for the Judge to carry out his proposal to withdraw the case from the jury. He would necessarily have gone on with the trial and submitted the evidence of express malice, if any, to the jury.

I have not felt called upon to consider this case as turning on the defence of privileged communication or publication on a privileged occasion. That ground of defence is not explicitly taken in the pleadings, was not expressly put forward amongst the grounds of appeal and was not definitely pressed upon us in argument.

The trial Judge was not directly asked to withdraw the case from the jury on the ground that there was no evidence of malice. No doubt he considered that, in the circumstances, the safer course was to leave the whole case to the jury. But, without determining whether this was, or was not, the proper course, it does seem to me that the trial Judge should have directed the jury to bear in mind that the criminal law applicable to municipal officers had been in force since the adoption of the Criminal Code, and that, in any event, apart from its being a criminal offence, the taking of remuneration by municipal officers from those having transactions with the municipalities was essentially fraudulent and dishonest, and forbidden by law prior to the enactment of the Code. More than

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that, I think it should have been made plain to the jury that the fact that any one of these transactions, wherein the officers received a commission, was known to one member, or even to all the members, of a council could make absolutely no difference in the criminal, civil or moral liability of the parties to it, if there were such liability. That the true shareholders of a municipal corporation are the ratepayers, and, even if each of these consented individually to a transaction of this kind, that also would not alter, condone or change whatever criminal, civil or moral liability, if any, there might be.

I think, therefore, that there must be a new trial on these grounds, and in view of the possibility of additional evidence. In the event of a new trial, I think the evidence of councillors and others intended to show that the transactions impugned were known to them should be rigorously excluded as irrelevant to the issue.

RICHARDS, J.A., PERDUE, J.A., and HAGGART, J.A., concurred, with Howell, C.J.M.

New trial granted.

[Appealed to the Supreme Court.—Ed.]

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STANDALL V. STANDALL. 1912

Before MATHERS, C.J.K.B.

Alimony—Interim alimony—Ability of defendant to pay—Second application for same relief—Offer to resume cohabitation—Cruelty—Desertion—King's Bench Act, Rule 942.

1. Interim alimony will not be ordered if it appears that the defendant has no ability to pay.

Pherrill v. *Pherrill*, (1903) 6 O. L. R. 642, followed.

2. In fixing the amount which the defendant should be ordered to pay for the plaintiff's disbursements in an action for alimony, no sum for counsel fees should be included unless it appears that the employment of counsel is necessary: King's Bench Act, Rule 942.

Cowie v. *Cowie*, (1908) 17 O. L. R. 44, followed.

3. The making of an application to the Court for any relief will be no bar to the making of a second application for the same relief, if the first application was merely allowed to lapse and no order was made upon it.

4. If the plaintiff in an alimony action alleges cruelty as well as desertion by the defendant, his offer to resume cohabitation is no answer to the plaintiff's right to interim alimony.

Theakstone v. *Theakstone*, (1905) 10 O. L. R. 386, followed.

DECIDED: 28th November, 1912.

Statement

APPEAL from an order of the Referee made the 31st October, 1912, ordering the defendant to pay $90 on or before the 9th day of November, as and for arrears of interim alimony from the 1st day of October, and to pay the sum of $15 per week thereafter up to the trial of this action; also to pay on or before the 8th November the sum of $75 as and for interim disbursements.

H. A. Bergman for defendant cited *Smith* v. *Edmunds*, 10 M.R. 240; *Cyr* v. *O'Flynn*, 5 W.L.R. 524; *Snider* v. *Snider*, 11 P.R. 140; *Karch* v. *Karch*, 21 O.W.R. 883; *Edwards* v. *Edwards*, 20 Gr. 392; *Falvey* v. *Falvey*, 2 O.W.R. 476; *Smith* v. *Smith*, 6 P.R. 51; 14 Cyc. 752; *Pherrill* v. *Pherrill*, 6 O.L.R. 642; *Lovell* v. *Lovell*, 5 O.W.R. 640, and *Cowie* v. *Cowie*, 17 O.L.R. 44.

E. L. Howell for plaintiff cited *Foden* v. *Foden*, [1894] P. 307; *McArthur* v. *McArthur*, 15 M.R. 151; *Pherrill* v. *Pherrill*, 6 O.L.R. 642, and *Bugg* v. *Bugg*, 14 O.W.R. 1014.

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Judgment.

MATHERS, C.J.

MATHERS, C.J.K.B. This action was begun on the 6th October, 1911, and the defence was filed on the 4th November following. On the 7th November, 1911, the plaintiff served a notice of motion for interim alimony and interim disbursements. In support of that motion an affidavit of the plaintiff was filed and on the 15th November an affidavit of the defendant was filed in opposition thereto, and on the 2nd December the defendant's affidavit was answered by an affidavit of the eldest daughter. Nothing further was done with that motion and no order was made upon it.

In October, 1912, a new notice of motion for the same relief was served. No new material was filed, but the plaintiff was cross-examined upon her previous affidavit, and the examination was used against her without objection. On this latter application the learned Referee made the order appealed from.

The first ground of appeal raised is that the order was made upon a second application for the same relief. In support of this objection *Smith* v. *Edmunds*, 10 M.R. 240, and *Cyr* v. *O'Flynn*, 5 W.L.R. 524, were relied upon. The reason for the rule that a second application will not be entertained after the dismissal of a previous application for the same purpose, is that the party has already got a judicial decision against him on the case he submits: *Payne* v. *Newberry*, 13 P.R. 392; *Dombey* v. *Playfair*, [1897] 1 Q.B. 368. As no order was made on the previous application it is no bar to the present motion. That ground of appeal therefore fails.

The plaintiff in her statement of claim alleges cruelty and desertion. The defendant by his defence and by his affidavit offers to resume cohabitation with the plaintiff. Such an offer, in the absence of an allegation of cruelty, would be an answer to the application: *Snider* v. *Snider*, 11 P.R. 140; but, in view of the allegations of cruelty in the statement of claim, the defendant's offer is

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no bar to the plaintiff's right to interim alimony: *Theakstone* v. *Theakstone,* 10 O.L.R. 386.

It is almost a year since this action has been at issue. It might have been brought down to trial at any time during that period. There is no reason, if the plaintiff so desires, why it should not be tried before the end of the year. During all that time the plaintiff has been able to support herself. She obtains her meals in the house of the defendant and she is earning $11 per week as a dressmaker. She is strong and healthy and able to continue to earn her own living. The housekeeping at the home is conducted by one of the daughters, who is 20 years of age. One of the sons is in employment and pays $5 per week as board, and they have a boarder who pays $4 per week.

It appears, however, that the burden of supporting the dependent children, of whom there are five, largely falls upon the plaintiff. In view of such cases as *Karch* v. *Karch,* 21 O.W.R. 883, I see no reason to differ from the conclusion arrived at by the Referee as to the right of the plaintiff to an order for alimony if the defendant is able to pay it.

As to the amount ordered I might have something to say; but, in view of the conclusion I have arrived at upon another point, it does not become necessary to deal with that question.

It seems to me that no case was made for ordering $75 as interim disbursements. The material is entirely silent as to what the actual disbursements are. Apart from counsel fees they should not exceed $25. An amount to cover counsel fees should not be ordered in view of Rule 942, unless it appears that the employment of counsel is necessary: *Cowie* v. *Cowie,* 17 O.L.R. 44.

Interim alimony will not be ordered if it appears that the defendant has no ability to pay. Upon this appeal an affidavit was, by leave, filed by the defendant upon which

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MATHERS, C.J.

he was cross-examined. This new material shows that since his affidavit, sworn to on the 15th November, 1911, two judgments have been recovered against him, one for $193 and one for $800, and that he has been examined as a judgment debtor. The house in which the family reside in the City of Winnipeg has been sold for taxes, amounting to about $150, and he is unable to redeem it. None of the properties which he owns bring in sufficient revenue to meet payments in connection with mortgages thereon and taxes. He has no money and no income whatever, except his daily wages as a tailor. I feel strongly convinced that, if the order of the learned Referee is permitted to stand, the defendant will be unable to comply with it. I think, under the circumstances, the order for interim alimony cannot stand: *Pherrill* v. *Pherrill*, 6 O.L.R. 642.

There will be some disbursements necessary in bringing this action down to trial. These I think the defendant should pay. I will, therefore, vary the order of the Referee by disallowing that part of it which directs payment of alimony and reduce the amount to be paid for disbursements to $25 without costs.

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IN THE COURT OF APPEAL.

FENSON v. SHORE.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Registered judgment—Verbal agreement to sell land—Statute of Frauds—Registry Act, R.S.M. 1902, c. 150, s. 72—Priority of unregistered equitable charge.

1. Although a verbal agreement to sell land cannot be enforced in an action because of the 4th section of the Statute of Frauds, yet it is valid at common law, and the statute does not affect its validity but only the remedy upon it.

Leroux v. *Brown*, (1852) 12 C.B. 801, followed.

2. If the judgment debtor has agreed to sell and convey his interest in land for valuable consideration before the registration of a certificate of the judgment, although such agreement is only a verbal one, he has no longer any interest in the land which can be bound by the registration, and the purchaser, who subsequently pays the purchase money and takes a conveyance from the judgment debtor, will take the land freed from any lien of the registered judgment.

Bank of Montreal v. *Condon*, (1896) 11 M.R. 366, and *Entwisle* v. *Lenz*, (1908) 9 W.L.R. 317, followed.

3. Section 72 of the Registry Act, R.S.M. 1902, c. 150, does not give a registered certificate of judgment priority over a prior unregistered equitable charge.

Case v. *Bartlett*, (1898) 12 M.R. 280, followed.

DECIDED: 25th November, 1912.

Statement

ACTION for the sale of land under a registered certificate of judgment.

The following judgment at the trial was delivered by MATHERS, C.J.K.B. The following facts were admitted: The plaintiffs on the 24th December, 1908, recovered a judgment in this Court against the defendant A. H. Shore for the sum of $618.45, which judgment is still unpaid. The defendant A. H. Shore is the devisee under the will of his mother, who died on the 10th day of February, 1911, of the north east quarter of Lot 141, D.G.S. 43 and 44 St. John, in the City of Winnipeg. The will was probated on the 18th April, 1911, by the executors and the above described land was by deed conveyed by them to A. H. Shore some time

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MATHERS, C.J.

between the 2nd and 20th days of June, 1911. In the beginning of April, 1911, A. H. Shore was indebted to his brother R. J. Shore in the sum of $150 for moneys advanced on his account, and he had further claims against him at that time amounting to $462.50. It was then verbally agreed between them that R. J. Shore should pay this claim of $462.50, and that in consideration thereof A. H. Shore should convey the lands in question to him. It is admitted that these two sums amounted together to the full value of the land.

On the 2nd day of June, 1911, the plaintiffs registered in the Land Titles Office in Winnipeg a certificate of their judgment. On the 20th day of June, 1911, A. H. Shore conveyed the land in question to R. J. Shore, pursuant to the agreement made in the beginning of April.

On these facts the plaintiffs contend: First, that the agreement between A. H. Shore and R. J. Shore, being verbal, was void under the 4th section of the Statute of Frauds, and was ineffectual to divest A. H. Shore of any interest which he had in the land, and when the plaintiffs' certificate of judgment was registered it bound the land as though A. H. Shore had charged it under his hand and seal.

Secondly, If the agreement was not void under the Statute of Frauds, R. J. Shore only acquired under it an equitable interest, which was void as against the plaintiffs' registered judgment under section 72 of the Registry Act, c. 150, R.S.M. 1902.

Admittedly a verbal agreement to sell land is valid at common law, and I cannot accede to Mr. Trueman's argument that such an agreement is rendered void by the 4th section of the Statute of Frauds. That a verbal agreement cannot be enforced because of this section is undoubtedly well-settled law; and I think it equally well settled that the statute does not affect the validity of the agreement but only the remedy upon it.

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The point was decided by *Leroux* v. *Brown,* 12 C.B. 801, in 1852, a case which has been referred to with approval several times since. For example, in *Jones* v. *Victoria,* 2 Q.B.D. at p. 323, Lush, J., says: "The signature required by the 4th section is not of the substance of the contract. It is matter of procedure only." And in *Re Hoyle,* [1893] 1 Ch., at p. 97, Lindley, L.J., after quoting the 4th section of the Statute of Frauds, says: "On the construction of this section certain points are settled: first, it was settled by *Leroux* v. *Brown* that the statute does not affect the validity of the contract, but only makes a particular kind of proof necessary to enable a party to bring an action upon it." And in the same case A. L. Smith, L.J., at p. 100, says: "It is settled by *Laythoarp* v. *Bryant,* 2 Bing. N.C. 735, and *Leroux* v. *Brown,* that the statute does not affect the contract, but only relates to the evidence of it."

Such being the law, the verbal agreement made between the parties in the beginning of April was as efficacious for transferring to R. J. Shore the beneficial interest in this land as if the parties had entered into a written agreement. It is true that, if A. H. Shore had chosen to be dishonest and had refused to carry out the agreement, the courts would have been powerless by reason of the 4th section of the Statute of Frauds to compel him to do so, but there was nothing to prevent him acting in good faith and carrying out the agreement as he has done.

When the agreement was made R. J. Shore at once became the beneficial owner of the land and, having paid the full purchase price agreed upon, A. H. Shore had no interest in it whatsoever. Under these circumstances *Bank of Montreal* v. *Condon,* 11 M.R. 366, and *Entwisle* v. *Lenz,* 9 W.L.R. 317, show that at the time the plaintiffs' certificate of judgment was registered A. H. Shore had no interest or estate in the land that could be sold under a registered certificate of judgment.

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dgment.

ATHERS, C.J.

In *Case* v. *Bartlett*, 12 M.R. 280, it was decided that section 72 of The Registry Act did not give a certificate of judgment issued and registered under the County Courts Act priority over a prior unregistered equitable charge. It was argued, however, that *Case* v. *Bartlett* did not apply because by the County Courts Act then in force a certificate of judgment registered thereunder only created a charge upon "all interest or estate" of the judgment debtor in the lands, whereas under The Judgments Act it creates a charge upon "all the lands" of the judgment debtor. The expression "lands," by the interpretation clause of the Act, includes "all real property and every estate, right, title and interest in land or real property both legal and equitable and of what nature and kind soever, and any contingent, executory or future interest therein and a possibility coupled with an interest in such land or real property, whether the object of the gift or limitation of such interest or possibility be ascertained or not, and also a right of entry whether immediate or future and whether vested or contingent into and upon land."

I cannot see that the plaintiff's position is in any way improved by the fact that his certificate might possibly bind an interest of his debtor in the land that would not have been bound under the County Courts Act. His right depends entirely upon the statute. He gets what the statute gives him and no more. His certificate bound the lands, as the expression is above defined, of the judgment debtor; but not lands belonging to somebody else, not lands that the judgment debtor had sold, and that were no longer his lands at the time the certificate was registered. In my opinion the reasoning of *Case* v. *Bartlett* applies exactly to this case.

The action will be dismissed. The parties have agreed that there should be no costs.

Plaintiff appealed.

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Argument.

W. H. Trueman for plaintiffs. Rights of parties must be determined at the date judgment was registered. On that date R. J. Shore did not have a memorandum of the agreement between A. H. Shore and himself and no act of part preformance had taken place to take the contract out of the Statute of Frauds. R. J. Shore could not enforce specific performance of the agreement if A. H. Shore pleaded the statute. The Court cannot assume that this defence would not be raised. Not having an enforceable agreement except at pleasure of another party, R. J. Shore had not an equitable estate in land at date judgment was registered. To have an equitable estate he should have been entitled to compel specific performance: *Torkington* v. *McGee* [1902] 2 K.B. 434; *London & S.W.R.* v. *Gomm,* 20 Ch. D. 562. In *Langton* v. *Horton,* 1 Hare, 560, it is intimated that if a prior equitable title be incomplete the claim of a subsequent judgment creditor will prevail. See also *Ex parte Broderick,* 18 Q.B.D. 766; *Daw* v. *Terrell,* 33 Beav. 218; *Ex parte Coombe,* 4 Madd. 249; *Neve* v. *Pennell,* 2 H. & M. 185. The estate must have been out of the debtor at the date judgment was registered: *Barrett* v. *Blake,* 2 B. & B. 357; *Case* v. *Bartlett,* 12 M.R. 288; *In re Bateman,* N.B. Eq. Cas. 538. The question has been expressly dealt with in *Snyder* v. *Botkin,* 16 S.E. 591; *Brown* v. *Butler,* 13 S.E. 70; *Fulkerson* v. *Taylor,* 46 S.E. 304. The case therefore does not come within the rule that a registered judgment will be postponed to the equitable estate or interest of a prior purchaser: *Whitworth* v. *Gaugain,* 1 Ph. 728; *Trueman* v. *Woodworth,* 1 N.B. Eq. 83; *Eyre* v. *McDowell,* 9 H.L.C. 619. R. J. Shore's only remedy was the recovery of the money paid: *Hughes* v. *Harris,* 2 De G. M. & G. 356; *Fry, Specific Performance,* (5th ed.) s. 613; *Durham* v. *Wick,* 2 Am. & Eng. Ann. Cas. 929. Payment of purchase money did not give R. J. Shore a lien

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Argument.

on the land. In order to have lien he would have to have a memorandum describing the land contracted for: *Rose* v. *Watson,* 10 H.L.C. 671; *Whitehead* v. *Watt* [1901] 1 Ch. 911; W. & T. Ld. Cas. 971. Doctrine of relation cannot prejudice rights of third parties: *Pattinson* v. *Tingley,* 5 Allen (N.B.) 537; *Frost* v. *Beekman,* 1 Johns Ch. 298. The Judgments Act, R.S.M. 1902, c. 91, s. 3, provides that a registered judgment shall have the same effect as though the debtor had charged land by writing under his hand and seal and, by section 72 of Registry Act, R.S.M. 1902, c. 150, no equitable lien, charge or interest affecting lands shall be deemed valid as against a registered instrument executed by a party. See *Rose* v. *Peterkin,* 9 A.R. 429; *Grindley* v. *Blakie,* 19 N.S. Rep. 27; *Miller* v. *Duggan,* 21 S.C.R. 33. Subsequently to the decision in *Case v. Bartlett,* 12 M.R. 280, the County Courts Act was amended by 5 & 6 Edw. VII., c. 15, [1906], making a registered judgment a charge on land, instead of upon the interest or estate of the judgment debtors. See *Re Massey and Gibson,* 7 M.R. 172, a case under the Real Property Act.

P. C. Locke for defendant, respondent, was not called upon.

THE COURT dismissed the appeal.

Appeal dismissed.

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KELLEY V. HOLLEY.

1913

Before GALT, J.

Vendor and purchaser—Acceptance of offer—Action for account—Costs.

The defendant was the trustee member of a syndicate which had made a speculative purchase of real estate of which the purchase money was payable by instalments. The plaintiff was a member of the syndicate and the defendant sent him a letter offering to pay him $2100 for his interest in the property or to sell to him his (plaintiff's) interest at the same price. Prior to sending this letter defendant had made a sale of part of the property but did not mention that fact in his letter. The letter requested a reply *by return mail* and, in closing, a *prompt* reply. The plaintiff's reply accepting the defendant's offer to sell was not communicated to the latter until 26 days after the defendant's letter should, in the ordinary course of the mails, have reached the plaintiff, and in the meantime the defendant had made a profitable sale of the balance of the property.

Held, that, considering the nature of the property, the terms of the offer and the surrounding circumstances fully set out in the judgment, the plaintiff was too late in communicating his acceptance of the offer to the defendant and that specific performance of the defendant's offer should be refused.

Held, also, that, as the defendant had furnished reasonably full statements of moneys received there should be no judgment against him for an account except a reference to the Master (if plaintiff desired it but at his own risk as to costs), to settle a few items of trifling amount.

The defendant was refused his costs as against the plaintiff because he had not informed the plaintiff about the sale of part of the property which he had made before sending his offer.

DECIDED: 30th November, 1912.

Statement

IN this action the plaintiff claimed that the defendant Holley was a trustee for him and the other defendants of certain lands, being 212½ acres more or less, in Manitoba, in the vicinity of Winnipeg, and he asked for an account and that a receiver be appointed, and that an alleged agreement by the defendant Holley to sell to the plaintiff said defendant's share in the property be specifically performed and for $5,000 damages as against the defendant Holley, etc.

S. E. Richards and *A. G. Kemp* for plaintiff cited *Brenan* v. *Preston*, 2 De G. M. & G. 839; *Gilmour* v.

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Argument.

Simon, 15 M.R. 205; and *Atty.-Gen.* v. *East Retford,* 2 M. & K. 35.

A. E. Hoskin, K.C., and *C. P. Fullerton, K.C.,* for defendant Holley cited *Tinn* v. *Hoffmann,* 29 L.T. N.S. 271; *Dickinson* v. *Dodds,* 2 Ch. D. 463; *Paterson* v. *Houghton,* 19 M.R. 168, 178; *Davis* v. *Shaw,* 21 O.L.R. 474; *Huggard* v. *Bennetto,* 22 M.R. 44, and *Brenan* v. *Preston,* 2 De G. M. & G. 839.

F. M. Burbidge for defendants Forman and Taylor.

H. A. Bergman for defendant Sheldon.

GALT, J. The transaction out of which the claim arises originated in an agreement made on May 7, 1907, expressed to be between Arthur Robert Taylor and Thomas William Holley, thereinafter called the trustees, of the first part, and William Chapman Sheldon, John Rollo Forman and Wellington Clifton Kelley, of the second part.

The original agreement was drawn by the plaintiff himself, and was for the purpose of buying as tenants in common the lands and premises in question and re-selling the lands at a profit.

The agreement contained, amongst others, the following clauses:

> "4. The parties hereto agree to pay, when called upon so to do under the terms hereof, such amounts in respect of the purchase price of the said lands, and in respect of taxes, improvements and solicitors' costs and real estate commissions and other expenses incidental to the management of the said lands, as said trustees may call for as hereafter provided, in the following proportions: The said Taylor, one-fourth part of the said sums; the said Holley, a one-eighth part of the said sums; the said Sheldon, a one-fourth part of the said sums; the said Forman, a one-fourth part of the said sums; and the said Kelley, a one-eighth part of the said sums."
>
> "6. Each of the parties hereto hereby charges his

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interest in the said lands, and in the moneys or securities to be derived therefrom under this agreement, with the payment of all moneys payable by him under the terms hereof, together with interest on said moneys from the time when they are demanded by the said trustees as herein provided until the time of payment thereof at 10 per cent per annum so long as they remain unpaid, and on default of payment by any party hereto for ninety days the said trustees may sell the interest of the party so in default on this agreement and apply the proceeds of such sale in settlement of the amount due by the said party as far as it will go, and the surplus, if any, is to be paid to the party in default."

"7. The parties hereto agree that the said trustees for them and each of them, but in their own name, are to take possession of, and to let, manage and improve the said land, and from time to time appoint any agents or servants to assist them in managing the same and to dismiss or remove such agents or servants and to appoint others, and also, as and when they shall think fit and subject to the approval of the parties of the second part, to sell and absolutely dispose of the said lands, either all together or in parcels, for such price or prices, and by public auction or private contract, as to said parties shall seem reasonable and expedient, and to convey, assign, transfer and make over the same respectively to the purchaser or purchasers thereof, with power to give credit for the whole or any part of the purchase money thereof and to permit the same to remain unpaid for whatever time and upon whatever security, real or personal, either comprehending the purchased property or not, as said parties of the second part shall think safe and proper, and upon default being made by the said purchaser or purchasers of said lands said trustees shall proceed to foreclose the said purchase and to make re-sales of the said lands in the same manner as if the same had not been sold."

The defendant Arthur Robert Taylor declined to act as trustee in the above agreement, and subsequently

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GALT, J.

another agreement, embodying the same terms, was made between the defendant Holley as trustee of the first part, and the plaintiff and the other defendants of the second part.

On the 28th May, 1907, an agreement was entered into between one William Cyrenus Hall, as vendor, of the first part, and the defendant Holley, as purchaser, of the second part, whereby said Hall agreed to convey the lands in question to the defendant Holley at the price of $75 per acre, payable as follows: $4,000 on the execution thereof, receipt whereof was thereby acknowledged; $3,800 by the purchaser assuming and paying a mortgage with interest thereon from the 30th March, 1907, now on said lands to the Union Trust Company, and the balance in three equal annual consecutive payments, the first of such payments to be made on the 31st May, 1908, together with interest thereon, excepting the said mortgage, at the rate of 6 per cent per annum from the 31st day of May, 1907, to be paid on the purchase money or so much thereof as should from time to time remain unpaid, whether before or after the same should become due.

The original agreement which had been drawn by the plaintiff was executed by the defendant Holley alone; but the subsequent agreement, which took its place, was executed by the defendants Forman, Sheldon and Taylor.

The purchase by Holley as trustee was intended to be a joint venture on behalf of the parties, but Holley alone was liable to the vendor in respect of the purchase. The plaintiff did not execute either of the agreements although the evidence shows that he was urged to do so.

Shortly after the purchase a decline occurred in the real estate market, and the parties discovered that the land might have been bought for about half the amount which Holley agreed to pay.

The initial payment of $4,000 was duly made and con-

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tributed to by the parties in accordance with their interests. When the first instalment payable under the agreement of sale fell due in 1908, the plaintiff made default in payment of his share and the defendant Holley was obliged to procure the money from other parties.

In December, 1908, the plaintiff was taken ill with pleurisy, and on March 30, 1909, he left Winnipeg and went to Summerland, British Columbia, where he has resided ever since. The plaintiff states that he continued to be ill in bed at Summerland for fourteen months after his arrival there.

When the second instalment of purchase money fell due in 1909 the plaintiff again made default in contributing his share, and also in respect of the third instalment in 1910. The defendant Holley obtained the requisite contribution from the other parties, but had to borrow money at a high rate of interest to protect Kelley's share.

The correspondence shows numerous urgent requests by Holley to Kelley to provide for his share, but without avail, until at length, early in 1911, Holley sued Kelley for his overdue payments, and succeeded in obtaining a settlement.

Meanwhile the mortgage had twice fallen into arrear and two actions had been brought against Holley for foreclosure, but he managed to raise sufficient money to avoid losing the property.

On the 9th June, 1910, Holley wrote to Kelley, saying:

> "The property is not saleable yet and has now cost considerably over $100 per acre, which is a high figure, and which is, of course, the reason why it could not be sold, because we paid too much for it. But even now, if you can make your payment, with the 10 per cent interest which I have had to pay to carry this along, I would much prefer this to a quit claim. I have no desire to cause you any inconvenience or trouble as you must know, because I

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have not bothered you for a long time in this matter; and, were it not for the fact that I am obliged to do something now before July 1st, I would have been pleased to have carried this further, but if you are not in a position to make your payment surely the easiest way out of it would be to give a quit claim."

On August 20, 1910, Holley again writes to Kelley:

"The writer has had no reply to my last letter, and I have been waiting anxiously to get one as we do not wish to cause any annoyance in the matter of the Hall property; but as you know it must be fixed up in some way and, as it will cost over $50.00 for solicitors' fees to settle up this matter, I am willing to make this proposition to you. I am enclosing a quit claim and you can send this to Mr. Hugg or anyone you wish, signed, and you can pay over the $50."

The plaintiff considered that $50 was too small an amount, but he was willing to take $125. The proposition, however, fell through, and in January Holley's action against Kelley for the arrears was brought and settled.

On April 22, 1911, Holley writes to Kelley:

"We have finally succeeded in getting your account settled with your solicitor, Mr. Richards, he having paid over the amount agreed upon to Mr. Haig; and, in view of the difficulties we have had and the unpleasant feeling which exist between the parties in this property and yourself, they all feel that we were not treated fairly in this matter, and personally I have to take the brunt of the blame from the other parties interested, because I did not as trustee collect the payment long before I did. I feel that the wisest course for me is to offer to sell my interest to you, or buy yours, and in view of this fact I am enclosing a quit claim for you to sign, and a removal caveat. You can sign this if you wish and return them here through your bank drawing on me for the sum of $2,100. If you wish to buy my interest I will sell at the same figure. This will

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relieve me of any further unpleasantness, and the writer would like to hear from you by return mail. If you do not care to sell or buy, I would like to have you sign the trust agreement as the other parties have done. It is unfair to them that they should be called upon to sign this trust agreement, and you refuse to do so. As the trust agreement and the agreement between Mr. Hall and myself was left entirely in your hands, and there seems to be no reason why you should not be willing to sign the agreement, which you drew up yourself, if you thought that it was perfectly fair and just that the others should sign such an agreement. Awaiting your prompt reply, I remain, etc."

Before dealing with the response to this letter, it should be here mentioned that on the 7th July, 1910, Holley succeeded in selling a portion of the property to Martin A. Hoover for the sum of $16,456, whereof $4,114 was paid in cash, and the balance was to be paid in three equal annual payments of $4,114 each on the 7th day of July in each of the years 1911, 1912 and 1913.

On December 11, 1910, the defendant Holley had furnished the plaintiff with an account purporting to show what was due from the plaintiff, amounting to the sum of $1,624.93; but that statement contained no reference to the Hoover sale. The action which was brought in January, 1911, by Holley against Kelley was for this last mentioned sum. Consequently when Holley made his offer to Kelley on April 22, 1911, Kelley was in ignorance of the Hoover sale and that his share of the moneys arising therefrom was already in the hands of the defendant Holley.

The plaintiff did not reply to Holley's offer until May 5, 1911, when he wrote stating: "After thinking the matter over I have decided to accept your offer to sell me your one-eighth interest for $2,100 cash, and I hereby accept same, and am ready to pay over the money at once. Mr. S. E. Richards will act as my solicitor.

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Kindly take up the matter of transfer of title with him as I would like to get it closed out." This acceptance of offer was sent by the plaintiff to his solicitor, Mr. Richards, and ought to have reached Winnipeg about May 10th. Upon receipt of Kelley's letter enclosing said acceptance, Mr. Richards made inquiries. Mr. Richards states that he received Kelley's acceptance of the offer and that he then saw Holley and got him to give him a written statement of the Hoover sale, about 21st May, 1911; and after considering the matter he caused Kelley's letter of acceptance to be served upon Holley on May 23rd.

Meanwhile on May 10, 1911, Holley gave an option to one Hugo Carstens to purchase the balance of the property for the sum of $44,000 payable as follows: The sum of $11,000 to be paid in cash on the execution of the agreement for sale, and the balance of $33,000 to become due and payable in three equal consecutive annual instalments of $11,000 each, the first of such instalments to become due and payable on the 15th May, 1912, with interest at 6 per cent, etc. And it was agreed that the option thereby given should be open for acceptance up to, but not later than twelve o'clock noon on the 15th day of May, 1911.

On May 13, 1911, Hugo Carstens accepted the option, and the sale was accordingly carried out.

The defendant Holley declined to recognize or comply with the acceptance of the offer which he had made to the plaintiff, dated April 22nd, and hence the present action.

The original transaction between the parties appears to have been more a joint venture in which Holley was appointed manager than an ordinary trust for sale.

The plaintiff contends, in the first place, that the lands sold by Holley to Hoover in 1910 were sold at an undervalue and without the plaintiff's consent, and he points out that, under clause 7 of the so-called syndicate agree-

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ment, the trustee was only entitled to sell "subject to the approval of the parties of the second part," and that he never approved of that sale.

The defendant Holley gave his evidence before me very frankly and satisfactorily. He stated that, before Kelley went away to Summerland, he had an interview with him and told Holley that he did not intend to put another dollar into the property and that Holley should sell the property for the best advantage he could and he would be satisfied. The whole venture was of a speculative and unpromising character, and it was most natural that Kelley should make some such statement as Holley says he did when leaving Winnipeg for a prolonged sojourn in British Columbia. Mr. Hugg, then a partner of Kelley in Winnipeg, confirms Kelley's determination to pay nothing further. I therefore accept Holley's testimony upon this point and I also find that the price realized from the sale to Hoover was, upon the evidence, a fair price for that portion of the land which was sold to him.

It may be that the plaintiff's illness necessarily incapacitated him from attending to business or earning any money at Summerland, but it must be borne in mind that he was jointly interested with several other persons, and it was most inconvenient to all concerned that he did not contribute any portion of his share. The reason given by the defendant Holley for not disclosing the Hoover sale to Kelley was that, under the terms of the syndicate agreement, he was entitled to apply any moneys in his hands coming due to any of the parties towards meeting their obligations to the original vendor, and the mortgagee; and he retained Kelley's share of the Hoover money to apply on Kelley's share of the mortgage obligation, fearing that if Kelley knew of it he would demand payment and continue his defaults.

Under the peculiar circumstances of this case I think the defendant Holley's conduct is not open to serious

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objection; subject to an observation which I will make later on.

Coming now to the offer made by Holley, it must be borne in mind that the whole subject matter was a speculation. Holley writes on April 22, 1911, making his alternative offer and requesting an answer by return mail, and at the end of his letter again urges the plaintiff to be prompt. That letter should in the ordinary course have reached the plaintiff on or about April 27th. Instead of replying promptly the plaintiff waits until May 5th, when he writes an acceptance of the offer and transmits it to his solicitor in Winnipeg. This acceptance should have reached Winnipeg on or about May 10th. By this time the Carstens' option had been given and was subsequently carried out. On May 21st Kelley's solicitor was informed of the Hoover sale, but it was not until May 23rd that the plaintiff's acceptance was communicated to the defendant Holley.

I think that, considering the terms of the offer, the nature of the property and the surrounding circumstances, the plaintiff was too late in attempting to accept the offer on May 5th; but, if for any reason that date could be considered reasonable, I think that it was certainly far too late on May 23rd. The claim for specific performance therefore fails.

With regard to the sale to Hoover, if the plaintiff had promptly accepted the other alternative of selling out his interest to Holley for $2100 without having been informed of the sale I do not think Holley could well have justified his purchase. Furthermore, it is impossible to say, if Holley had, in his letter of April 22nd, informed Kelley of the sale to Hoover, that Kelley would not have acted promptly in accepting the offer. If Kelley had done so he would have realized substantial profit.

I think that, when Holley made his alternative offer of April 22nd, he was certainly under an obligation to in-

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form Kelley of the facts relating to the Hoover sale, in order to enable Kelley to decide which offer he would accept. By intentionally omitting to do this Holley has placed himself in the wrong, and disentitled himself to the usual protection in the way of costs.

The plaintiff claims that an account should be taken of the defendant Holley's dealings with the land and money of the plaintiff and defendants; and incidentally the plaintiff, in his evidence, disputes Holley's right to charge a commission on sales made by him of the syndicate property at the rate of 10 per cent. I think the evidence given by both Holley and other defendants establishes that a 10 per cent commission was to be the remuneration to the trustee. It must be borne in mind that Holley alone was bound by the covenants in the original transfer from Hall to Holley, and the trust necessarily involved a large amount of personal attention by the so-called trustee in addition to the anxiety arising out of the obligations which he had incurred on behalf of the syndicate. It is stated, I think by more than one of the defendants, that the plaintiff himself was present when the arrangement as to 10 per cent commission was approved of. I feel satisfied that the arrangement was in fact made, and that the plaintiff has probably forgotten the incident.

The defendant Holley furnished accounts to the plaintiff on at least two occasions, but he omitted to include anything relative to the Hoover sale. In May, 1911, when the plaintiff's solicitor was settling the action which had been brought by Holley against Kelley, careful inquiries were made as to the trustee's accounts, and the solicitor was permitted to examine the books and otherwise ascertain the figures. Then on May 21st the solicitor was furnished by Holley with a statement containing the figures of the Hoover sale. The only outstanding items of account relate to the Carstens sale, and I understand that there is no dispute about those figures.

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The only items objected to on the argument before me in the accounts rendered by the defendant Holley, apart from the figures of the Hoover sale which were omitted, were a few items of trifling amount, and the facts relating to these ought to be capable of easy explanation between the parties. If they are unable to agree on the figures, there may be a reference to the Master to settle them, in which case the costs of such reference will be reserved to be dealt with after the Master has made his report.

With the single exception of the omission to inform Kelley of the facts relating to the Hoover sale, I find the conduct of Holley to have been unobjectionable, and beneficial to all the members of the syndicate. There is no ground upon which to base his removal from the trust, or for the appointment of a receiver. The claim for damages and for an account (other than the account above directed, which the plaintiff will take at his own risk) also fail.

The plaintiff's action will, therefore, be dismissed, without costs as against the defendant Holley, but with costs as against the other defendants.

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IN THE COURT OF APPEAL.

SAWYER v. MUTUAL LIFE ASSURANCE COMPANY.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Life Insurance—Conditions in application—Answers to medical examiner—Evidence—Warranty—Construction of contract.

In an application for life insurance, signed by the applicant, he declared that "to the best of my knowledge, information and belief, my health is good, * * * that I usually enjoy good health, * * * that the statements made above are respectively full, complete and true; and I agree that such statements with this declaration, and any statements made or to be made to the company's examining physician, shall form the basis of the contract for such assurance; and, if there be therein any untruth or suppression of facts material to the contract, the policy shall be void."

Held, that this warranty, so far as it applied to the applicant's statements to the examining physician, applied to the answers actually given to him by the applicant, and not necessarily to those taken down in writing by the examiner, so that, if the applicant actually gave truthful information to him in answer to a question on a material point, the policy was not avoided by reason only that such information did not appear in the written answers, also that the qualification, "to the best of my knowledge, information and belief," extended to everything in the paragraph above quoted.

Miller v. *Confederation Life*, (1888) 14 S. C. R. 330, and *Joel* v. *Law Union*, [1908] 2 K. B. 863, followed.

The trial Judge found upon the evidence that the Insurance Company had not proved affirmatively that the applicant knew he had heart disease at the time of the application, also that he had sufficiently disclosed to the examiner the facts in answer to the question as to when and for what disease he had last consulted a physician.

Held, (PERDUE J.A. dissenting), that these findings were warranted by the evidence and the verdict for the plaintiff should stand.

DECIDED: 18th November, 1912.

Statement

PLAINTIFF sued as the beneficiary in a policy of assurance issued by the defendant Company on the life of her husband, William Sawyer, on the 24th day of March, 1910.

The insured died on or about the 4th day of December, 1910, and the Company resisted payment on the ground that certain statements and answers made by the insured and forming part of the contract for insurance sued on

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were not full, complete and true statements and answers, and denied that the policy of assurance was in full force and effect at the time of the death of the said William Sawyer, but that, on the contrary, the policy never came into force or effect.

The case was tried before Macdonald, J., who gave judgment for the plaintiff for $2,000, with interest from January 4th, 1911.

Defendants appealed.

A. E. Hoskin, K.C., for defendants, appellants, cited *New York Life* v. *Fletcher*, 117 U.S. 519; *Biggar* v. *Rock Life Ass.*, [1902] 1 K.B. 516; *Phœnix* v. *Berechree*, 3 Commonwealth, 946; *Kniseley* v. *British America Ass. Co.*, 32 O.R. 376; *Taylor* v. *G.T.R.*, 4 O.L.R. 357; *Am. Abell* v. *Tourond*, 19 M.R. 660; *Provident Ass.* v. *Mowat*, 32 S.C.R. 137; *Anderson* v. *Fitzgerald*, 4 H.L.Cas. 483; *Thomson* v. *Weems*, 9 A.C. 671; *Russell* v. *Canada Life*, 32 U.C.C.P. 256; *Jordan* v. *Provincial*, 28 S.C.R. 554; *Confed. Life* v. *Miller*, 14 S.C.R. 330; *London Omnibus Co.* v. *Holloway*, 81 L.J.K.B. 603, [1912] 2 K.B. 72, and *Joel* v. *Law Union* [1908] 2 K.B. 863; 887-8.

J. P. Curran, K.C., for plaintiff, respondent, cited *Confed. Life* v. *Miller*, 14 S.C.R. 344; *Fowkes* v. *Manchester Life*, 3 B. & S. 917; *North British* v. *McLellan*, 21 S.C.R. 288; *Hemmings* v. *Sceptre Life*, [1905] 1 Ch. 366; *Joel* v. *Law Union*, [1908] 2 K.B. 884; *Brownlie* v. *Campbell*, 5 A.C. 954; *Hastings Mutual* v. *Shannon*, 2 S.C.R. 394; *Graham* v. *Ont. Mutual*, 14 O.R. 364; *Vezina* v. *Canada Fire*, 9 Q.L.R. 65 and *Miner* v. *Excelsior Life*, 16 W.L.R. 698.

P. J. Montague in reply cited *Smith* v. *Excelsior*, 22 O.W.R. 863, and *Prairie City* v. *Standard*, 19 M.R. 720.

HOWELL, C.J.M. I have had the advantage of reading the judgments of my brother Judges and I agree with the majority that this appeal should be dismissed.

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It seems to me, from the evidence of the plaintiff of the treatment which she was administering to the deceased at the time of his visit to Dr. Langrill and from what the deceased told Dr. Wright about what that doctor was treating him for, it is reasonable to suppose that the deceased really believed he was suffering from indigestion, and that, if Dr. Langrill did tell him it was heart trouble, the deceased did not believe it, or thought it was mere heart irregularity arising out of indigestion.

There is a wide difference between the facts in the case of *Biggar* v. *Rock Life,* [1902] 1 K.B. 516, and in this case. In that case the agent to solicit insurance filled up the answers, and it was not a part of his duties to do so, in this case it was the duty of the doctor to ask the questions, explain them and properly fill up the answers. I gather from the printed form used that the examination must be private and the whole matter, consisting of the questions and answers, together with the doctor's answers and report and the classification of the risk, must be mailed by the defendants' medical examiner direct to the defendants' headquarters.

It was plainly the duty of this examiner to fill up the answers properly, and in this case he thought he had done so. The error was that of an officer of the defendants and he admits it.

The provision or warranty in the policy is: "any statements made * * to the Company's examining physician shall form the basis of the contract." This does not distinguish between verbal and written ones and, in strict reading, the verbal statement as to the deceased's visit to Dr. Langrill complies with the warranty.

I do not think the findings of fact of the learned trial Judge should be disturbed, and I agree with the majority of the Court that upon these facts the case of *Confederation Life* v. *Miller,* 14 S.C.R. 330, and *Joel* v.

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Law Union, [1908] 2 K.B. 863, justify the judgment for the plaintiff.

The appeal is dismissed with costs.

RICHARDS, J.A. The plaintiff brought this action on a policy of insurance issued by the defendants on the life of the plaintiff's husband, William Sawyer, the policy being payable, on its face, to the plaintiff. The application for assurance was dated the 5th February, 1910, and contains a clause, which, omitting words not material to this action, is as follows:

"I, the applicant for the above assurance, hereby declare that, to the best of my knowledge, information and belief, my health is good, * * ; that I usually enjoy good health, * * ; that the statements made above are respectively full, complete and true; and I agree that such statements with this declaration, and any statements made or to be made to the company's examining physician, shall form the basis of the contract for such assurance; and, if there be therein any untruth or suppression of facts material to the contract, the policy shall be void * * ."

On the 28th February the applicant, William Sawyer, was examined by the defendants' examining physician, Dr. Wright. At that examination the doctor filled up the answers to a paper, which had not been in the hands of the applicant, but which the doctor had received from the defendants, or their agent, and which is called "Answers to be made by the applicant to the medical examiner," and which has the direction that it must be mailed by the examiner direct to the head office of the defendants. The document contains a large number of questions. Dr. Wright read the questions, as they appear on the paper, without explanations, to the applicant, and wrote down, as to some of them at least, not the applicant's exact answers, but what he, the examiner, considered to be their substance. These answers were not read by, or read over to, the applicant, who had no reason to suppose that they were not taken down in his own words, and as fully as he had stated them. As soon as the answers were completed he signed, at the

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examiner's request but without reading it, a statement at the end, of which the following is a copy:

"I, the undersigned applicant, hereby declare on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, that to the best of my knowledge, information and belief, each of the above answers is full, complete and true, and is a continuation of, and forms a part of, my application for assurance to The Mutual Life Assurance Company of Canada."

The policy, omitting parts not material to this action, reads:

"In consideration of the application for this policy, which is hereby made a part of this contract, * * The Mutual Life Assurance Company of Canada assures the life of William Sawyer, * * and promises to pay * * to his wife Agnes Sawyer * * .

"This policy is issued by the Company and accepted by the assured upon and subject to the provisoes and conditions printed and written on the succeeding pages hereof, which are hereby made a part of this contract."

On the back of the page containing the contract is the following:

"Warranty in Application.

"The following is a copy of part of the application for this policy and forms a part of the assurance contract."

Then follows an exact copy of the paragraph above quoted at the end of the application for insurance.

The assured died on the 4th December, 1910. The death certificate, signed by Dr. Langrill, and forwarded to the Company, stated that he died from embolus, following heart disease. The medical testimony explained that embolus means a clot, or growth, formed in the valve of the heart, and which, getting loose from the heart, gets into the system. In this case it is supposed to have got into the deceased's brain and to have caused his death.

The Company resisted payment of the policy on the ground that the applicant made, knowingly, untrue answers to two of the questions in the document of 28th February, 1910, and that such answers were material to the assurance, and that the assurance was therefore void.

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They also claimed that, irrespective of the knowledge, the effect of the policy and the above quoted paragraph in the application for insurance, and of the also above quoted paragraph at the end of the medical examiner's questions, was a warranty of the truth of the answers and of full disclosure having been made, and that there had been a breach of such warranty, which rendered the contract void.

Dr. Langrill, who signed the death certificate, was called as a witness by the defendants. He stated that on the 14th of October, 1909, a little less than four months before the application for insurance, Sawyer went to him and was examined by him and found to be suffering from mitral regurgitation of the heart. The doctor says he then told him that he had heart trouble and gave him medicine for it. The doctor says that in December, 1909, Sawyer again came to him and was found to be improving in condition.

The defendants also called as a witness Dr. Moir, who stated that in August, 1910, Sawyer went to see him and that he told him to go home, and that the next day he, the doctor, went to Sawyer's house and found him suffering from mitral regurgitation of the heart and a mild attack of typhoid fever, and that Sawyer then told him (the doctor) that he had heart trouble.

The questions, as to which it is claimed that Sawyer gave untrue answers, are those numbered 8 (*c*) and 9, in the document of 28th February, 1910. 8 (*c*) reads as follows: "Have you now or have you ever had any disease or disorder (*c*) of the heart or blood vessels?"

Under that, in smaller type, appears the words: "Atheroma, Aneurism, Palpitation of the heart, Varicose Veins," etc.

The answer taken down by the doctor to this was "No."

Question 9 is "When were you last attended by a

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physician, or when did you consult one, and for what disease?" And the answer is "Three years ago for fractured rib."

It is claimed, as to question 8 (*c*), that the applicant had been told by Dr. Langrill, and knew, that he had heart disease and that, therefore, the answer to question 8 (*c*) was knowingly untrue.

It is said, as to question 9 and the answer to it, that he must have been aware in February, 1910, that he had been attended by Dr. Langrill in the preceding October and December, and that, therefore, in answering "Three years ago for fractured ribs," he was guilty of wilful suppression or, at any rate, of a suppression of a material fact.

Dr. Wright's evidence, with reference to his examination of the applicant and to these questions in particular, is, in effect, as follows: He read the questions over to Sawyer, but made no explanations as he went along; he took down the answers substantially as Sawyer gave them; he did not repeat the answers as he wrote them down, and Sawyer, so far as he could say, relied on his putting down faithfully what he had told him. He says he made a stethoscopic examination, putting the stethoscope next to Sawyer's skin, and that he found nothing abnormal with his heart, and he thinks he would have found out if anything had been wrong. He says he thinks Sawyer would have given him any information he asked for, and that he believed Sawyer honest in what he said, and that, so far as he could tell, Sawyer might have been suffering from heart trouble and not have been conscious of it.

With regard to question 9, Dr. Wright says that when answering the 14th question, which was as to whether his weight had increased or decreased, Sawyer said that he remembered that he had gone and seen Dr. Langrill, and that Dr. Langrill had told him that he was suffering

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from a pain tn the stomach, and that it was due to acute indigestion, or, at any rate, to indigestion. He says Sawyer further stated that he was all right after he had taken a few doses of the medicine prescribed by Dr. Langrill. The examiner admits that it was through his own mistake that this answer was not taken down, and that it was in no way the fault of the insured. Dr. Wright was the company's regular examiner in that district, and had taken quite a number of examinations for insurance.

In the case of *Miller* v. *Confederation Life,* 14 S.C.R. at 330, the application contained a paragraph which is as follows:

"I * * do hereby warrant and guarantee that the answers given to the above questions (all of which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for. I * * do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association."

It was held that the words "to the best of my knowledge and belief" qualified not only the words which preceded them but also the words which followed them. It seems to me that we are bound by that case to hold that the similar words in the paragraphs in question qualify the whole of the paragraphs, and that the result is that, even if there is a warranty in the present case, the warranty is wholly qualified by the words "to the best of my knowledge, information and belief."

The case of *Joel* v. *Law Union & Crown Ins. Co.,* [1908] 2 K.B. 863, though not on all fours with this case, was one in which the applicant signed a statement that the answers made to the medical examiner were all true. The statement was not qualified by any words limiting it to the best of her knowledge, information or

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belief. It was held, in that case, that this statement was not part of the contract; but the question was gone into very carefully as to whether her omission to state that she had been attended by a doctor, named Kinsey Morgan, (who, if applied to by the company, would probably have given them information as to matters which the applicant was not aware of, but which were material to be considered on the question of granting the policy) was such a suppression of fact as would amount to fraud and would nullify the contract. The case is of great value as showing how the Court looked upon the answers to the medical examiner. They held that the document was of no practical value, in the absence of evidence of explanation to the applicant of the meaning of the questions, which are couched, like those of the present case, largely in medical terms, which a layman would not be expected to understand, and, in the absence of explanations of the exact answers made to them by the applicant, they holding that it was patent that what was written down as answers was not the exact answers, but the medical examiner's conclusions from those answers, and that, for the purpose of arriving at the good faith of the applicant, the document was of practically no importance. The question of good faith is undoubtedly of the utmost importance, even if, in the present case, there is a warranty.

Now, to deal first with the answer to question 8 (*c*): Two questions arise—first, was Sawyer, in fact, suffering from heart disease when he was examined by Dr. Wright; and secondly, if so, did he know the fact.

It will be borne in mind that, as decided in the Joel case above referred to, the onus is most strongly upon the defendants to prove both of these points. On reading Dr. Langrill's testimony carefully, it appears to me that he does not say that he told Sawyer that he had heart disease. He says he told him he had "heart trouble."

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Now, it appears from the testimony that severe indigestion will cause temporary heart trouble, and I am not at all satisfied, from Dr. Langrill's testimony, that he told the applicant anything more than that he had heart trouble, caused by indigestion, which the applicant would reasonably think would be temporary, and would not suspect to be due to disease of the heart. It is almost certain, to my mind, that that is all the doctor would tell him, if doing his duty to him. If he knew that the man had a trouble, which could not be cured but might be alleviated by medicines, he would know that the effect of telling the man that his trouble was incurable, would be greatly depressing, and would probably hasten his end. Viewing, therefore, what seems to me his duty in the matter, together with his cross-examination, I am of opinion that the utmost that he told the man was that he had heart trouble, and that he directly, or indirectly, led him to believe that that would end with the curing of the indigestion. At any rate, the evidence does not seem to me strong enough to meet the heavy onus cast upon the defendants to prove clearly that Sawyer did know he had heart disease. I am also, after carefully considering the testimony, not free from doubt as to whether Dr. Langrill was not, to some extent, unconsciously biassed in his testimony, as to what he told Sawyer, by the fact that the man appeared to have died from heart disease. The fact that Dr. Wright carefully examined the applicant with the stethoscope, seems to me to strengthen this view of the case. I find it difficult to realize that, if the man had mitral regurgitation of the heart in October and December, Dr. Wright would fail to discover that fact in the following February. It appears, from the testimony, to be incurable, and it also appears, from the testimony, to be very easily detected from the murmuring of the heart, and there is nothing in the testimony to show that Sawyer could, in any way, have concealed it from the examining doctor.

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Dr. Moir's testimony, I think, should not have been admitted. He examined this man about six months after the time at which Dr. Wright's examination failed to discover heart disease. To my mind this testimony, even if admissible, which I doubt, is but a faint circumstance to be considered, and is not of material help to the defence. The man might have had no disease of the heart in February and yet might have it in August following.

It seems to me, therefore, that the defendants have failed to prove that on 28th February, the time of the examination by Dr. Wright, Sawyer knew he had heart disease.

As to the 9th question and answer, I think the contention is sufficiently met by the fact that, although Sawyer did not, at the moment the question was asked him, disclose the fact that he had been attended by Dr. Langrill, he did state that during the examination to the medical examiner. The medical examiner admits that it was his duty to take this down, and that he did not do so. Can it be said that this was not disclosed? The medical examiner was the agent of the company, and not Sawyer's agent in any respect. The evidence shows that he did not read the questions over to Sawyer, but immediately, at the close of the examination, got him to sign the statement (which the defendants rely on) at the end of the paper. Sawyer would naturally suppose that the doctor had reduced to writing the statements which he, Sawyer, had verbally made to him, and that he was signing his own words put in writing. I think it is impossible to hold that the company, after such disclosure as to Dr. Langrill's attendance, can avail themselves of that which arose from the mistake of their agent, and not from any act of the applicant. But, further, let us consider what the applicant, if he gave a

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warranty as to the answers to the medical examiner, did warrant as to them.

In the application of 5th February, he says:

"I agree that such statements with this declaration"—meaning those then above written in the application, and which are not complained of—"and any statements *made or to be made to the company's examining physician,* shall form the basis of the contract. . . ."

It is those two latter statements, those "made or to be made to the company's examining physician," on which the defence is based. These words surely mean no more than what tney say. They refer, on their face, only to the statements "made or to be made" to the doctor. If they have any meaning, they refer, and refer only, to what the applicant actually says to the doctor. They do not refer, or pretend to refer, or be limited to, what the doctor may write down as his understanding, or summary, of what the applicant states to him.

The document of 28th February says: "Each of the *above* answers . . . is a continuation of and forms a part of my application for insurance." Taking this document by itself, the words, "the *above* answers," would raise a doubt whether they might not refer, and be limited to, the answers as written down by Dr. Wright. But, taking it by itself, it creates no contractual relations. So taken, it is only a representation of facts, and comes within the same class as the signed statement at the end of the answers to the medical examiner in *Joel* v. *Law Union,* etc., above referred to. Even as a representation of facts, it is weaker than the Joel one, as it is limited to knowledge, information and belief, while the Joel one was not so limited.

To create a contractual relation, it has to be read with, and as part of, the document of 5th February, which describes, in express words, as above mentioned, what the

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answers are which the applicant makes part of the basis of the contract. It bears the heading "Answers to be made by the applicant to the medical examiner." Now, if the answers, as written down by the doctor, are carried into the document of 5th February by the use of the words, "the above answers," in the paper of 28th February, which I can not think they are, then the applicant warrants the truth of two sets of answers—those he makes verbally to the doctor, and those the doctor chooses to write down. The result would be, that there would be two sets of answers, which would probably not be co-extensive, as in this case they are not. Could it then be said that, because the necessary disclosure was only made in those actually given by the applicant, its absence in those put down by the company's agent could be relied on as a suppression of fact? The result would be absurd and oppressive, and would, in the great majority of cases of loss, put it in the insurer's power to pay, or not, as they might choose.

Bearing in mind the above, and the fact that the onus is entirely on the defendants, and the rule mentioned in the Joel case and other cases, that such documents are to be construed strongly against the company who prepared them, I am of the opinion that the words, "the above answers," in the paper of 28th February can refer only to the statements to the medical examiner, mentioned and described in that of 5th February, that is to say the verbal statements of the applicant.

If I am right in the above, it follows that, as Sawyer did tell Dr. Wright of having been attended by Dr. Langrill, and of what he supposed he had been attended for, he properly and sufficiently answered question 9 to the best of his knowledge, information and belief—which is all the document required him to do—and it was not his concern that Dr. Wright did not write that down and inform the company of it.

I would dismiss the appeal with costs.

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PERDUE, J.A. This action is brought by the beneficiary named in a life insurance policy to recover the amount of the policy from the defendants, the insurers. The defence raised is, shortly, the making of untrue answers to questions and suppression of material facts by the deceased when effecting the insurance.

On 5th February, 1910, the deceased, William Sawyer, the husband of the plaintiff, Agnes Sawyer, made application for the insurance in question. On the 28th of the same month he was examined by the company's medical examiner, Dr. Wright, and the policy, which is dated 24th March, 1910, was issued in due course. By the terms of the policy the application is made a part of the contract, and the conditions printed on the succeeding pages of the policy are also made a part of the contract. On the next page of the policy there appears the following:

"Warranty in Application.

"The following is a copy of part of the application for this policy and forms a part of the assurance contract:

"I, the applicant for the above assurance, hereby declare that, to the best of my knowledge, information and belief, my health is good, my mind sound and my habits temperate; that I usually enjoy good health and do not practice any habits that tend to impair my health or shorten my life; that the statements made above are respectively full, complete and true; and I agree that such statements with this declaration, and any statements made or to be made to the Company's examining physician shall form the basis of the contract for such assurance; and, if there be therein any untruth or suppression of facts material to the contract, the policy shall be void and any premiums paid thereon forfeited."

The paragraph last above cited is contained *verbatim* in the application signed by the deceased.

The first part of the medical examiner's report contains questions put to the applicant for insurance while he was under examination, and the answers made by him thereto and taken down by the medical examiner. This part of the report was, as required by the insurers, signed by the applicant. It contains the following declaration made over the signature of the applicant:

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"I, the undersigned applicant, hereby declare, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, that, to the best of my knowledge, information and belief, each of the above answers is full, complete and true, and is a continuation of, and forms part of, my application for assurance to The Mutual Life Assurance Company of Canada."

The 8th question in the report contained the following enquiry:

"Have you now, or have you ever had, any disease or disorder:
(Omitting (*a*) and (*b*) which do not affect the case)
(*c*) of the heart
or blood vessels?
Atheroma Palpitation of Varicose Veins,
Aneurism the heart etc.
(Omitting (*e*), (*f*), (*g*) and (*h*))
(*i*) Have you had any other serious illness, operation or injury?"

To each of these questions, (*c*) and (*i*), the applicant answered, "No."

The 9th question was as follows:

"When were you last attended by a physician, or when did you consult one, and for what disease?

The answer given to this question by the applicant was: "Three years ago for fractured rib."

By the 11th question the applicant was asked: "Are you now in perfect health?" To this he answered, "Yes."

It is proved that on 14th October, 1909, less than four months before the application was signed, the deceased consulted his family physician, Dr. Langrill, complaining of great weakness and of pains in the region of the heart. Dr. Langrill, who was called as a witness, stated that he made a thorough examination of Sawyer and found that he was suffering from a valvular disease of the heart, technically called mitral regurgitation. The doctor told him that he, Sawyer, had heart trouble, advised rest and abstention from work, and gave him a prescription. This prescription was proved by the medical testimony called to be a usual and proper one for the disease of the heart from which the patient was believed to be suffering. This

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prescription was made up by a druggist and taken by Sawyer. The prescription was refilled for him on several occasions, extending over a period of about six months, according to the evidence of the druggist. About seven weeks after his first visit, that is to say, about 1st December, 1909, Sawyer consulted Dr. Langrill again, who found a strong mitral murmur still present He advised a continuation of the same treatment and told Sawyer to take at least four or five more bottles of the medicine.

In August, 1910, the deceased, in the absence of Dr. Langrill, consulted Dr. Moir. The last named physician made an examination and found that Sawyer was then suffering from serious mitral regurgitation. On the following day Dr. Moir attended him at his house and then told him that he had heart disease. Sawyer said he was aware of the fact, he was aware that he had heart trouble. At the same time the deceased was suffering from a mild attack of typhoid fever, from which he made a rapid recovery.

On 3rd December, 1910, the deceased was attacked with sudden illness, of which he died on the following day. The cause of death was, according to the undisputed medical testimony, embolus or clot on the brain caused by heart disease.

From the above facts it appears that, less than four months prior to making application for the insurance, the deceased had heart disease and was treated therefor. His medical attendant swears that he then told the deceased that he had heart trouble and advised him and prescribed for him as being in that condition. There is no contradiction of Dr. Langrill's statement that he informed the deceased as to the nature of the disease from which he was suffering. The deceased in the following August certainly knew that he had heart disease. How did he acquire this knowledge? After his second visit to Dr. Langrill, which took place about 1st December, 1909, he

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does not appear to have consulted any physician until August, 1910, when he was attended by Dr. Moir, yet he then told Dr. Moir that he knew he had heart trouble. No source of information is suggested other than what Dr. Langrill told him and what he learned from Dr. Langrill must have been learned, at the latest, early in the month of December prior to his applying for the insurance. Further, evidence was put in on the part of the plaintiff that Sawyer, on being canvassed by the company's agent in the fall of 1909, said: "Perhaps I would not pass, I have been in to see Dr. Langrill." Bremner, the agent, saw Langrill and, from what the latter said, Bremner understood him to be of opinion that Sawyer was "not in a position for insuring at that time." There is a contradiction between Langrill and Bremner as to what took place at subsequent interviews, but I do not consider these important in considering the question whether Sawyer knew his true condition or not. The fact that Sawyer had doubts as to whether he was insurable or not, by reason of something Dr. Langrill had told him, is some corroboration of Dr. Langrill's statement that he disclosed to Sawyer the nature of the disease.

The learned trial Judge has not dealt with the positive statement of Dr. Langrill that he informed Sawyer that the latter had heart trouble or heart disease, and he does not deal with the other facts referred to as lending corroboration to the view that Sawyer was aware at the time he signed the application that his heart was in some way affected. I am convinced that the deceased knew he had some disorder of the heart at the time he was examined by the medical examiner. It is true that the valvular disease was not detected when he was examined on 28th February, 1910. It may have been less pronounced at that time as a result of the treatment he had been receiving, but the facts that he felt better and that the

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medical examiner failed to detect the disease did not in any way justify Sawyer in refraining from giving information that he had been under treatment for heart trouble three or four months previously.

"In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides*, that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy:"

Per Lord Blackburn in *Brownlie* v. *Campbell*, 5 A.C. 925, at p. 954; See also *London Assurance* v. *Mansel*, 11 Ch.D. 363, and cases there referred to; *Hals. Laws of England*, Vol. 17, section 1100; *Porter on Ins.* 5th ed. p. 175. In this respect there is a wide difference between contracts of marine or life insurance and contracts relating to other matters. In ordinary contracts there is not the same obligation to make disclosure or the same consequences of concealment: *Brownlie* v. *Campbell*, *supra*, p. 954.

The matters covered by questions 8, 9 and 11 of the first part of the medical examiner's report were shown in the evidence to be material; they are in fact most material, seeking as they do information as to the applicant's past and present health, and the diseases, if any, for which he has been treated. By question 8 the direct enquiry was put to the applicant, "Have you now or have you ever had any disease or disorder of the heart or blood vessels?" To this he answered "No," although he must have known at that time that he either then had, or had had within four months previously, some disorder, if not disease, of the heart. I cannot avoid the conclusion that the answer to this question was untrue to the knowledge of the applicant.

Question 9 contains a simple and direct enquiry as

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when the applicant was last attended by a physician, or when did he consult one, and for what disease. His answer was, "three years ago for a fractured rib." He conceals the fact that he was, within the previous three or four months, under treatment by Dr. Langrill for some internal disorder, whether he knew or not that it was heart disease, and although he had been, according to the evidence of the druggist and of his wife, continuing to take the medicine prescribed for him up to or in the same month in which he made the answer.

It is urged, by way of excuse, for the answer to question 9, that the applicant thought so lightly of the complaint that he overlooked making any reference to it until he was answering the last question contained in that part of the report. According to the evidence of the medical examiner, the applicant, when considering the answer relating to increase or decrease of weight, stated, as an afterthought, that he had a pain in the region of the stomach, that Dr. Langrill said it was due to indigestion, and that he was all right after he took a few doses of the medicine prescribed by Dr. Langrill. This statement, made as Dr. Wright gives it in his evidence, is untrue in fact, in that Dr. Langrill treated the applicant, not for indigestion, but for heart disease. For the reasons I have already set forth I believe that the applicant knew at the time that he had been treated for heart disease and not for indigestion. In the next place the applicant, in making the statement that he became all right after taking a few doses of the medicine, concealed the fact that he continued taking bottle after bottle of the medicine over a period of several months, and that he twice consulted Dr. Langrill in regard to his complaint, there being an interval of seven weeks between the consultations. In making the statement, therefore, he wilfully belittled and misstated the facts and endeavored to conceal and did conceal, even in making the statement, the serious nature

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of his disorder. If his ailment was as trivial as he made it appear to Dr. Wright, why was he, when Bremner spoke to him, apprehensive as to his ability to pass the medical examination?

The answer to question 9 as entered in the report is untrue in failing to disclose that the applicant had been attended and treated by Dr. Langrill on 14th October, 1909, and again seven weeks thereafter. The answer was untrue to the knowledge of the applicant. But, it is said, he afterwards, in the course of the examination, mentioned to Dr. Wright the fact that he had been treated by Dr. Langrill and that Dr. Wright, through an oversight, omitted to add this to the answer to question 9. I have already shown that, even if his statement had been entered in the report as he gave it to Dr. Wright, it would still have been untrue and misleading; but, granting for the moment that the statement was true, honest and complete in so far as the knowledge of the applicant went, the fact still remains that the statement was not entered in the report and was not placed before the defendants when they had to decide whether they would grant the insurance or not. It is argued that the omission of the statement from the report was due to the mistake of the defendants' medical examiner, that it was known to him and that, if he failed to enter it in the report, the defendants are bound by his knowledge and by his acts as their agent. But the part of the report which contains the questions and answers under consideration was signed by the applicant, who, over his signature, declared that, to the best of his knowledge, information and belief, each of the answers was full, complete and true and was a continuation of and formed part of the application for insurance. The answers as written down in the report formed, along with statements contained in the application, the basis of the contract of insurance. To this the applicant had agreed when he signed the

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application, and it was his duty to see that his answers were set down correctly before he signed them and gave his warranty that they were, so far as his knowledge and belief extended, full, complete and true. In such a case it will be presumed that the applicant read the answers before signing them, and he must, if he did not take the trouble to read them, be treated as having adopted them: *Biggar* v. *Rock Life Ass. Co.*, [1902] 1 K.B. 516, following *New York Life* v. *Fletcher*, 117 U.S. 519. In the latter case it was held that the signing of an application for insurance without reading or hearing it read was inexcusable negligence, and that a party is bound to know what he signed. As further bearing out this principle I would refer to *Kniseley* v. *British Am. Ass. Co.* 32 O.R. 376; *Taylor* v. *G.T.R.*, 4 O.L.R. 357; *Parker* v. *S.E.R.* 2 C.P.D. 416, 421; *New York Life* v. *McMaster*, 87 Fed. Rep. 63.

The medical examiner was, no doubt, the agent of the defendants for the purpose of putting the questions, but he was not their agent for the purpose of inserting wrong answers or suppressing the true answers to the detriment of the insurers and to the benefit of the applicant. This proposition is supported by *Biggar* v. *Rock Life Ass. Co.* and *New York Life* v. *Fletcher*, above cited, and they have been approved in *Phœnix Ass. Co.* v. *Berechree*, 3 Commonwealth, 946.

In *Joel* v. *Law Union & Crown*, [1908] 2 K.B. 863, Lord Justice Moulton expressed the opinion that the replies of the applicant in that case to the medical examiner were only intended as statements made by her, to the best of her knowledge, for the purpose of assisting the medical referee and the company to judge of the risk they were taking. But in that case there was nothing in the signed documents which made the accuracy of the answers to the medical examiner a condition of the contract, or the basis of the contract, as there was in the present case.

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I have treated the warranty given by the applicant in this case, according to its purport, as one given to the best of his knowledge, information and belief, and not as an unconditional one. But I think that information relating to material matters within the knowledge of the applicant, which he was bound to furnish as the very basis of the contract, was concealed and not transmitted to the company. The company was misled as to facts which would materially affect the risk and these facts were known to the applicant.

The conversations which took place, before the application was signed, between Dr. Langrill and Bremner, the company's agent, do not in my view affect the contract between the applicant and the company. Bremner was an agent to receive and forward applications. It was not his duty to ascertain facts relating to the health of the applicant, and a statement by Dr. Langrill that it was safe to insure the applicant, although he denies having made any such statement, would be irrelevant and would not affect either party to the contract. The only effect of these conversations, which were introduced by the plaintiff, was to show that there had been some discussion and some doubt as to whether the applicant was in a condition of health to pass examination for life insurance.

In a case like the present, sympathy always runs strongly with the widow who is seeking to recover insurance on the life of her deceased husband, but cases must be decided apart from sympathy and in the cold light of the facts and of the law to be applied to each.

I regret that I must arrive at the conclusion that the appeal should be allowed, and the plaintiff's action dismissed.

CAMERON, J.A. The facts in this case are set out in the judgment of the learned trial Judge, who entered

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judgment for the plaintiff for the amount of the policy sued upon.

In moving to set aside this judgment counsel for the defendant company pointed out that the assured on October 14, 1909, saw Dr. Langrill, who diagnosed his case as one of mitral regurgitation, prescribed for it and told the assured what the trouble was. "I said it was heart trouble that bothered him and heart troubled him and I gave (told?) him how he could conduct himself so as to benefit from this disease," p. 35. About seven weeks after that the assured came to him again, when the doctor renewed the advice he had previously given and told him to take four or five bottles more of the medicine he had prescribed. The assured continued to get the medicine until late in February.

The assurance was effected in February, 1910, and the policy actually issued March 24 of that year.

In August, 1910, the assured went to consult Dr. Moir (in the absence of Dr. Langrill) and, on a second interview with him, Dr. Moir diagnosed the case as one of mitral regurgitation also.

On December 4, 1910, the assured died from embolus following heart disease, as the learned Judge finds. The death certificate which was filed, signed by Dr. Langrill, assigned therein as the cause of death: "Embolus following heart disease." In this view Dr. Moir seems to concur.

It is urged that the answers of the applicant to questions 8·(*c*), 8 (*i*) and 9 by the medical examiner were untrue; that they are made part of the application and of the policy and that, whether fraudulently made or not, the policy being founded on untrue representations must fall to the ground.

As to these answers we are referred to *Porter on Insurance,* p. 183. If an applicant for insurance is required to sign answers to questions which are part of

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the policy, it is his duty to read them before signing, and it will be presumed that he did. In support of this are cited *New York Life* v. *Fletcher,* 117 U.S. 519, and *Biggar* v. *Rock Life,* [1902] 1 K.B. 516, in which latter case the former is quoted with approval. See also *Phœnix* v. *Berechree,* 3 Com. 946, and *Knisely* v. *British America Ass. Co.,* 32 O.R. 276. It is the contention that, on these authorities, the assured having answered question 9 untruly, the defendant must succeed. But Dr. Wright admits the deceased did call his attention to the fact that he had been to see Dr. Langrill a short time previously and that he had then been prescribed for. That Dr. Wright failed to get this answer correctly cannot prejudice the beneficiary's right to bring this action. It cannot surely be argued that Dr. Wright became the agent of the deceased in neglecting to set forth with accuracy the information given him. The reasoning applied in *Biggar* v. *Rock Life,* that, where the agent, whose authority from the company was limited, wrote in untrue answers in the application, he did so, not as agent for the company, but as agent for the applicant, cannot fairly be extended to cover this case, where the information was furnished by the applicant in good faith but, by an oversight of the medical officer whose duty it was to put it in writing, was not written down, though he thought he had done so. A question arises whether the condition in the policy applies to written answers and statements only. It does not seem to exclude verbal answers.

It was further argued that the correctness of the answers was warranted by the terms of the policy and that such warranty was absolute, irrespective of the materiality of the answers, and that even if there were no fraud or concealment the plaintiff must fail. It is the truth and not the materiality of the statements that governs.

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In support of this view there was cited to us *Anderson* v. *Fitzgerald,* 4 H.L.C. 483, where it is stated that "that principle (involved in the distinction between a warranty and a representation) has no application to a case where it is part of the contract, as it is here, that, if a particular statement is untrue, then the contract shall be at an end," p. 504. We were also referred to *Thomson* v. *Weems,* 9 A.C. 671, where Lord Blackburn said, at p. 683: "It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and, if they do so, the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material: the parties would not have made it a part of their contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material." *Porter on Insurance,* p. 165-166; *Russell* v. *Canada Life,* 32 U.C.C.P. 256, and *Jordan* v. *Provincial Provident,* 28 S.C.R. 554, were also referred to. That a contract of insurance is a contract *uberrimae fidei* demanding full disclosure is well settled. That is the law apart from any contract: *Joel* v. *Law Union & Crown,* [1908] 2 K.B. 863.

The contention of the plaintiff is that the warranty in the application which forms part of the contract is not absolute, and unqualified, and that it is throughout subject to the reservation that the statements therein made and referred to are true to the best of the knowledge, information and belief of the applicant. The learned trial Judge says expressly: "I cannot find that the applicant knowingly made untrue answers," and, after a perusal of the evidence, I must say that, while there are difficulties, nevertheless I can see no adequate reason for reversing this finding of fact. There are contradictions, and the

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trial Judge had the witnesses in view on their examination and cross-examination. I would say, upon consideration of the evidence, that it seems to me that the applicant, a man of good repute and standing, acted at his interview with the medical examiner and otherwise as an honest man desirous of affording the company full information.

What construction then are we to place upon the warranty in the application? It did seem to me on my first perusal that the words "to the best of my knowledge, information and belief" could not, on a strict grammatical construction, be carried forward to the succeeding sub-divisions of the paragraph. But the judgment of the Supreme Court in *Confederation Life* v. *Miller,* 14 S.C.R. at 344, gives the rule of construction to be followed.

"The rule of construction is that, the language of the warranty being framed by the defendants themselves, the warranty must be read in the sense in which the person who was required to sign it should reasonably have understood it, and it is impossible to conceive that a person who was interrogated as to his knowledge and belief in respect of the matters enquired into could have understood that, notwithstanding that he should answer the questions put to him truly, according to the utmost of his knowledge and belief, he should nevertheless forfeit his policy if through ignorance the facts as stated by him should not prove to be absolutely true, apart altogether from his knowledge and belief."

"Where the policy provides only against intentional misstatements, an innocent misrepresentation in the declaration, though the latter is made the basis of the contract, will not avoid it." *Halsbury, Laws of England,* XVII, sec. 1103, citing *Fowkes* v. *Manchester,* 3 B. & S. 925; *Hemmings* v. *Sceptre Life,* [1905] 1 Ch. 365, and *Joel* v. *Law Union,* [1908] 2 K.B. 863. In the last case it was held that the answers to the questions by the applicant were not part of the policy, but nevertheless there was an obligation to make a full disclosure of material facts. The answers of the applicant to the questions were merely statements "to the best of her knowledge for the purpose

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of assisting the medical referee and the company to judge of the goodness of her life, *i.e.* of the risk they were taking," per Lord Justice Fletcher Moulton, 889. It is important to notice that the "onus of proving non-disclosure or concealment is on the insurance office," per Vaughan Williams, p. 880.

I think the judgment of the trial Judge should stand, and that the appeal should be dismissed.

HAGGART, J.A. The trial Judge gives the facts in detail. He accepts the version of the witness Bremner where there is a difference between his story and that of Dr. Langrill.

The deceased was not anxious to enter into the contract of insurance. For two years he had been canvassed at different times by the agent Bremner and, when he finally consented, he frankly told the agent that Langrill had been treating him and said he might not pass. The agent saw Langrill, who suggested that they should wait awhile, and, if we believe Bremner as the trial Judge did, Langrill after the lapse of a short time intimated that it would be safe to insure the man.

The application or proposal was signed in the usual way. The applicant was examined by the defendants' regular medical officer; the policy was issued and the premium paid.

The defendants deny liability on the grounds that the assured did not make an honest disclosure in his application and answers to the medical officer, that the truth of his answers was warranted and expressly made the basis of the contract.

Sawyer certainly did not appear to be eager to make the contract. The witnesses speak of him as an honest, truthful man. I cannot gather from the evidence that Sawyer ever thought he had an incurable disease. The suggestion of Dr. Langrill to wait would mean to him

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that it was a passing trouble and that time and treatment would cure it. And the fact that the examining physician did not detect any signs of serious ailment would corroborate the view that the assured considered himself in the enjoyment of good health, and had no thought or reason to think that he was afflicted with a fatal disease, and, when he was answering the many questions of a more or less technical nature, that any past troubles were not present to his mind and that his answers were true to the best of his belief. I can understand that the assured had considered that the trouble for which Langrill had treated him had passed away, or that it was not present to his mind, and, as to the answer to the other question as to when he had been last treated, Dr. Wright, the physician, admits that during the examination the proper information had been given him and it was owing to his neglect or forgetfulness that the correct statement was not written in the formal papers.

At the foot of the list of questions, to which answers were made to the medical examiner, there is this declaration: "I, the undersigned applicant, hereby declare . . . . that, to the best of my knowledge, information and belief, each of the above answers is full, complete and true, and is a continuation of and forms a part of my application for assurance. . . ."

There is a similar declaration in the application filled out by the agent, and in the policy it is agreed that the declaration shall form the basis of the contract. In all are the words of limitation "to the best of my knowledge, information and belief."

The defendants contend that this stipulation is an absolute warranty and that the accuracy of the information contained in the answers goes to the basis of the contract, and *New York Life* v. *Fletcher*, 117 U.S.R. 519; *Biggar* v. *Rock Life Ass.*, [1902] 1 K.B. 517; *Phœnix Ins.* v. *Berechree*, 3 Com. 946; *Kniseley* v. *British Am.*

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Ass. 32 O.R. 376; *Taylor* v. *G.T.R.* 4 O.L.R. 357; *American Abell* v. *Tourond,* 19 M.R. 660; *Anderson* v. *Fitzgerald,* 4 H.L.C. 483; *Thompson* v. *Weems,* 9 A.C. 671; *Russell* v. *Canada Life,* 32 U.C.C.P. 256, are some of the authorities relied on by the defendants.

Notice the words of limitation, "to the best of my knowledge, information and belief."

In the cases above referred to I cannot find such qualifying words standing in the same relation to the context. They all go to establish the principle that the insurer is entitled to a full and truthful disclosure of all the facts so far as the insured knows them.

Did Sawyer give truthful answers to the physician's interrogatories?

In *Confederation Life* v. *Miller,* 14 S.C.R. 330, the application contained a declaration in which the applicant warranted and guaranteeed that the answers were true according to the best of his knowledge and belief, and agreed that the proposal should be the basis of the contract and that any misstatement or suppression of facts in his answers to the questions, or in his answers to the medical examiner, should render the policy void. It was held, affirming the judgment of the Court below, that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to the best of my knowledge and belief." The observations of Mr. Justice Gwynne, on p. 344, are applicable to the present case. He says:

"Now this statement, being qualified by the words, 'to the best of my knowledge and belief', can only be untrue if the contrary to what is stated be the truth, namely that to his knowledge and belief he had received some other serious personal injury than that stated. Whether that was so or not was for the jury to say and the learned Judge left to them all the evidence from which they might infer what was the knowledge and belief of the applicant upon the point in question. The rule of construction is, that the language of the warranty being framed by the defendants themselves, the warranty must be read

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in the sense in which the person who was required to sign it should reasonably have understood it, and it is impossible to conceive that a person who was interrogated as to his knowledge and belief in respect to the matters inquired into could have understood that, notwithstanding he should answer the questions put to him truly according to the utmost of his knowledge and belief, he should nevertheless forfeit his policy, if through ignorance the facts as stated by him should not prove to be absolutely true apart altogether from his knowledge and belief."

This case was approved and followed in *Metropolitan Life* v. *Montreal Coal Co.*, 35 S.C.R. 266, where it was held that, unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted. On the application for life insurance the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life companies, but omitted to mention two accident policies. The policy provided that the statements in the application should be warranties and form part of the contract. The language of the warranty, being framed by the Company, should be read in the sense in which the person required to sign it should have reasonably understood it: the words should be construed *contra preferentes* and in favor of the assured: *Joel* v. *Law Union & Crown*, [1908] 2 K.B. 863. In this case the proposal contained a declaration that the statements so made were, "to the best of her knowledge and belief," true and she agreed that the proposal and declaration should be the basis of the contract. Subsequently she answered questions on her medical examination which were filled in by the doctor. She was asked to give the names of medical men consulted by her, and whether among other complaints she had ever suffered from mental derangement. In answer to the first question she had left out the name of a doctor she had consulted, and to the second she answered in the negative, while, as a matter of fact, she had been confined

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for acute mania, although not aware of the fact. The two grounds of defence were, first, it was claimed that the accuracy of the answers was a condition precedent to the validity of the policy, and second, misstatement and non-disclosure of material facts.

Vaughan-Williams, L.J., at pp. 874-5, says: "I do not think there is anything in law to make the truth of the answers a condition precedent to the liability of the defendants on the policy and, if the truth of the answers were not such a condition, it comes within the statement of Willes, J., in his judgment in *Wheelton* v. *Hardisty,* 8 E. & B. p. 299, where he says: "Unless it were untrue to the knowledge of the plaintiffs, and therefore fraudulent, the mere untruth of it would not avoid any policy in which it was introduced, the policy containing no express stipulation to that effect." And, at p. 880: "The onus of proving non-disclosure or concealment is on the insurance office," and, at p. 884, Fletcher-Moulton, L.J., says: "But in my opinion there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess," and, addressing himself to the interrogatories of the physician, he remarks: "I entertain the strongest opinion that the accuracy of the replies to the doctor who examined her was not a contractual limitation or condition of the contract, but that these replies were, and were intended by both parties to be, only statements by her to the best of her knowledge for the purpose of assisting the medical referee and the Company to judge of the goodness of her life, the risk they were taking."

In *Halsbury's Laws of England,* vol. 17, sec. 1102, the foregoing propositions are condensed as follows:

"Although a warranty must be strictly complied with, nevertheless, such a construction will be given to it as

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will give effect to the meaning which the parties must be presumed to have intended; and, if a person states in the declaration merely what he believes or is informed that a certain fact is true or that he is not aware of any circumstance tending to shorten his life, the warranty only extends to the state of his belief, information and knowledge, and not to the facts of which he is *bona fide* unaware."

Chief Justice Strong (then Mr. Justice Strong) in *North British* v. *McLellan,* 21 S.C.R. at p. 297, discussing the effect of a similar declaration where the limiting words were: "So far as the same are known to the applicant and material to the risk," says: "I do not agree in the meaning and construction attributed to this clause at the foot of the application which is relied on by the appellants and which is set forth in their factum. This would make the applicant pledge himself to the truth and materiality of his statements absolutely, which is just what the words, 'so far as the same are known and material to the risk,' protect him against. It would be impossible to attribute to these words the meaning contended for without perverting the language actually used. It appears to me that the respondent only undertook to affirm the truth of his statements so far as they were known to him, and as they were material to the risk."

I canont agree with the defendants' contention that the doctor was the agent of the assured when he filled in the answers to the interrogatories administered by him. The doctor was, I assume, the paid servant of the defendants. He took his instructions from them, reported to them direct. It was a confidential relationship. Is he then the agent for the Company in everything excepting when he makes a mistake to the prejudice of the assured? He admits that he got information during the examination which should have been incorporated in the answers. The defendants ought not to be allowed to set up such a defence.

If I accept the finding of facts of the trial Judge, and take his estimate of the value of the testimony of the

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respective witnesses, and believe that the assured made truthful answers according to the best of his knowledge, information and belief, at the time he was questioned, then the defendants, upon whom the onus lies, have failed to establish the defence of misstatement and concealment.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

[Appealed to the Supreme Court. Ed.]

IN THE COURT OF APPEAL.

MORRISON V. RUTLEDGE.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Examination for discovery—Relevancy of questions—Refusal to answer.

On the pleadings as they stood the plaintiff's case was that he had, at the request of the defendant and for his accommodation, assigned to the defendant an agreement of sale of land securing the sum of $1500, in order that the defendant might borrow money from a bank on the security of the agreement, that, subsequently, the defendant voluntarily transferred to him certain shares in a company as security for the return of the agreement and that the defendant had refused to re-assign the agreement although the plaintiff was willing to return the shares, whilst the defendant denied that the transaction was a loan and set up that he had actually purchased the agreement from the plaintiff, giving him 15 fully paid up shares in the company as a consideration for it.

Held, HAGGART, J. A., dissenting, that the defendant should not be compelled, on his examination for discovery, to answer questions as to whether the shares referred to were or were not fully paid up in fact, or as to what, if anything, had been paid by him on the shares, such questions not being relevant to the issues raised.

Hopper v. *Dunsmuir*, (1903) 10 B.C.R. 23, referred to.

Colter v. *McPherson*, (1888) 12 P.R. 630, distinguished.

DECIDED: 4th November, 1912.

Statement

APPEAL from an order of Mathers, C.J.K.B., discharging an order of the Referee which directed de-

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fendant to answer certain questions which he had refused to answer on his examination for discovery.

J. H. Leech for plaintiff, appellant, cited *Colter* v. *McPherson,* 12 P.R. 630; *Adams* v. *Hutchings,* 3 Terr. R. 181; *Ings* v. *Calgary,* 4 Terr. R. 58; *Bank of B. C.* v. *Trapp,* 7 B.C.R. 354; *Hopper* v. *Dunsmuir,* 10 B.C.R. 23; *MacMahon* v. *Ry. P. Ass.* 26 O.L.R. 430; *McInnes* v. *British Columbia,* 13 B.C.R. 465; and *Reg* v. *Brown,* 21 U.C.R. 330.

J. C. Collinson for defendant, respondent, cited *McCracken* v. *McIntyre,* 1 S.C.R. 479; *Burkinshaw* v. *Nicolls,* 3 A.C. 1004; 10 Cyc. 483, and *Bentley* v. *Murphy,* 2 O.L.R. 665.

PERDUE, J.A. The case which the plaintiff sets up in his statement of claim is that he assigned a certain agreement of sale to the defendant at the request of the defendant by way of loan in order to enable the defendant to raise money; that subsequently the defendant voluntarily delivered to the plaintiff certain shares of capital stock in a company as security for the return of the agreement, and that the defendant had refused to reassign the agreement, the plaintiff being willing to return the shares. The defendant denies that the transaction was a loan and sets up that he actually purchased the agreement from the plaintiff, giving him 15 fully paid up shares in the capital stock of the above company as a consideration for the assignment of the agreement.

On the examination of the defendant for discovery the plaintiff sought to ask him a number of questions for the purpose of ascertaining whether the shares in question were or were not fully paid up in fact. The Referee in Chambers ordered the defendant to answer the questions, and this order was reversed on appeal by Mathers, C.J.K.B.

It is clear that the issue between the parties is, was

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the transaction in regard to the agreement a loan to the defendant or not? Anything that would throw light upon the real transaction between the parties would be relevant to the issue and might be made the subject of inquiry on an examination of the defendant for discovery.

If it could be shown that the answers to the questions under consideration in this case would in any way assist the plaintiff in proving his case or in meeting the defence set up, the defendant should, in my opinion, be ordered to answer them.

In England discovery is obtained by securing answers to interrogatories administered to the opposite party. It has been held by the Court of Appeal that unless the interrogatories are strictly relevant to the question at issue they should be excluded: *Kennedy* v. *Dodson*, [1895] 1 Ch. 334. In that case A. L. Smith, L.J., said:

"The legitimate use, and the only legitimate use, of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case; and, if the party interrogating goes further and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted."

It is necessary to briefly point out the difference between the English practice and our own. In England the only means of obtaining discovery from the opposite party is by means of interrogatories, and these can only be administered for the purpose of discovery in its strict sense. The examination provided for by our Rule 387, although usually referred to as an examination for discovery, goes much beyond pure discovery. The rule provides that a party may be examined "touching the matters in question in the action * * * by any person adverse in point of interest and may be compelled to attend and testify in the same manner, upon the same

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terms, and subject to the same rules of examination as any witness, except as hereinafter provided."

Rule 395 provides that any party orally examined under the rule shall be subject to cross-examination and re-examination "and the examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode in use on a trial."

By Rule 405 any party may at the trial of an action or issue use in evidence any part of the examination of the opposite party, subject to the provision that the Judge may look at the examination and allow other parts of the examination to be put in, if they are so connected with the part already put in that the one should not be used without the other.

These rules show that a party examining the opposite party before trial may go much further in regard to the questions asked than would be allowed in England under the practice of administering interrogatories.

In *Kennedy* v. *Dodson,* above referred to, it is pointed out that, although interrogatories might be ruled out as irrelevant, questions to the same effect might be asked of the party in cross-examination. A clear distinction is drawn in that case between what might be allowed on cross-examination and what would be proper for interrogatories.

Under our rules cross-examination of the opposite party upon a so-called examination for discovery is clearly provided for, and the party examining is not confined to asking questions which would merely go to proving the plaintiff's case. He may also by cross-examination endeavor to obtain statements or admissions from the defendant relating to the matters in question which would tend to displace the defence set up. The difference between the English practice and that provided by the King's Bench rules is very clearly pointed out by Hunter, C.J., in *Hopper* v. *Dunsmuir,* 10 B.C.R. 23.

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It is urged by the plaintiff that, because the defendant alleged that the stock was fully paid up, he should be allowed to elicit from the defendant facts relating to the issue and payment for the stock, and as to whether it is fully paid stock or may involve a liability for calls. This, however, is not one of the issues before the Court as the pleadings are framed. Even if the plaintiff could show that the stock was not fully paid up, that in no way would assist him in the case he seeks to make out, namely, that the agreement was transferred to the defendant simply as a loan for the accommodation of the defendant. In order to make the questions material, some case of concealment, misrepresentation, or fraud on the part of the defendant would have to be made out, and this would involve the admission by the plaintiff that the stock had been sold to him or transferred to him in exchange for the agreement, a totally different transaction from the one actually set up by the plaintiff.

I think the greatest latitude should be allowed to a litigant who is examining an adverse party, so that the fullest inquiry might be made as to all matters which can possibly affect the issues between the parties; but in the present case I think the plaintiff has failed to show that answers to the questions, if obtained, might assist him in proving the case he is seeking to establish against the defendant.

I think the appeal should be dismissed with costs to the defendant in any event of the cause.

CAMERON, J.A. This is an appeal from an order of the Chief Justice of the King's Bench reversing an order of the Referee ordering the defendant to attend at his own expense and answer certain questions put to him on his examination for discovery.

It is alleged in the statement of claim that the plaintiff, holder and owner of a certain agreement of sale of

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land under which a sum of money was payable to him, assigned the agreement to the defendant purely for the accommodation of the defendant, and to enable him to raise money thereon for his own purposes. The defendant, it is further alleged, voluntarily delivered to the plaintiff as security for the return of the agreement certain certificates of shares in the Killarney Lakeside Park Company, Limited. The plaintiff offered to re-transfer said shares and asked for a re-assignment of the agreement of sale. The defence set up is that the transfer of the agreement in exchange for the shares, which are described in the statement of defence as "fifteen fully paid up shares," was absolute.

The questions which the defendant refused to answer were directed to ascertaining what, if anything, had been paid by the defendant upon the shares.

On behalf of the appellant it was contended that a party in examination for discovery has as wide a range as when cross-examining at the trial, and that the question as to what was paid upon the shares was relevant to the issue between the parties inasmuch as it is alleged in the defence that the shares were fully paid up, and inasmuch as the answers would throw some light on the transaction, it being argued that, if there were nothing paid on them, and if the holders were still liable in proceedings taken by creditors, it would be a strong element to show that the plaintiff did not consider the transaction an exchange.

As to the point that the wording of the statement of defence puts the question of the amount paid on the shares directly in issue, I would consider that the words "fully paid up" are really descriptive and therefore not essential in the pleading. There is, therefore, no issue on the point.

As to the scope of counsel on an examination, a subject which includes the point that the questions here

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refused to be answered were and are relevant, various authorities were cited from Ontario and the North-west Territories and British Columbia, whose statutory provisions respecting such an examination resemble our own, viz.: *Colter* v. *McPherson,* 12 P.R. 630; *Adams* v. *Hutchings,* 3 Terr. L.R. 181; *Ings* v. *Calgary Hospital,* 4 T.L.R. 58; *Bank of British Columbia* v. *Trapp,* 7 B.C.R. 354; *Hopper* v. *Dunsmuir,* 10 B.C.R. 23, and *McInnes* v. *B.C. Electric Ry. Co.,* 13 B.C.R. 465. The *Colter case* is at once distinguishable as the transactions therein in question clearly tended to throw light on the whole fraudulent scheme alleged. The effect of those decisions is, in my opinion, to lay down the principle that an examination for discovery is in the nature of a cross-examination but limited to the issues raised by the pleadings. Such is the rule as stated in *Ross on Discovery,* Canadian Edition, 99, where these cases are cited.

It is the value of the shares at the time of this transaction only, the value as then known to the parties, that could have any bearing on, or tendency to influence, their subsequent actions or conduct. Shares partly, or wholly, unpaid may have a great value. Shares that are wholly paid up may have no value whatever. Therefore, I would consider that the answers to these questions put to the defendant on his examination cannot be said to be relevant, or, rather, can be said not to be relevant, to the issues herein. In my opinion the view of the Chief Justice should be upheld and I would dismiss this appeal with costs to the defendant in any event.

HAGGART, J.A. The statement of claim avers that, to assist the defendant in getting an advance from his banker, the plaintiff, at the defendant's request, transferred to him the plaintiff's interest as vendor in a certain agreement of sale and purchase of lands which shows the original consideration to have been $2500, and upon

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which there was still a balance owing of $1500 and some interest, that the defendant expected to be able to repay the banker in six or seven months, when he, the defendant, would re-transfer the agreement to the plaintiff: that subsequently the defendant voluntarily delivered to the plaintiff as security for the return of the agreement of sale of land certain certificates for shares in the Killarney Lakeside Park Co., that the plaintiff has offered to return the shares and asks for a re-transfer of the agreement of sale.

The statement of defence denies that the transaction is such as set out by the plaintiff, and that it was only a loan of the security to raise money, and alleges that it was an absolute transfer, and in exchange for 15 fully paid shares of capital stock of the said Company of the par value of $100 each, which he at the time transferred to the plaintiff, and he claims to be the absolute owner of the agreement for sale.

The question to be tried is in substance whether the transfer of the agreement was absolute, or only by way of loan.

On the examination the defendant admits that he was one of the original incorporators, gives the names of the principal promoters or stockholders, states the objects of the Company, and that he got his shares direct from the Company. A series of questions is then propounded with a view of eliciting the information as to whether the defendant had paid for the stock and if so how much (it is not necessary to give the questions in detail), and the defendant refuses to answer on advice of counsel.

Now, it is true that the manner of his acquiring the stock or the price he paid for it is not a fact in issue, but that does not conclude the matter. The right to interrogate is not confined to the facts directly in issue, but extends to any facts which may be relevant in the determination of the questions to be tried.

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The defendant alleges a concluded agreement, an exchange of properties. The nature and character of the properties forming the subject matter of the transaction may be relevant. As to the agreement of sale, there appears to have been paid $1000, and there is a balance of $1500 owing. Both parties want it. It is probably worth the full amount unpaid. As to the stock, neither wants it. It is not a Company apparently whose stock is listed, and which has a stable market value. Its value would depend upon the honesty and ability of the executive, the amount of its assets, the fact as to whether the stock was fully paid for in money or money's worth, and as to whether part of the stock was presented to the stockholders. This is information that might be relevant and useful to the Judge or jury on the trial.

In *Marriott* v. *Chamberlain,* 17 Q.B.D. 154, Lord Esher, M.R., concludes his judgment in these words: "The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts: and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute but forms no part of the facts themselves. But, with these exceptions, it seems to me that pretty nearly everything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue."

Nash v. *Layton,* [1911] 2 Ch. 71, is a recent case. It was an action brought to enforce a charge given by a borrower to secure a loan, and the defence was that the plaintiff was a money-lender. The interrogatories were as to what other loans the plaintiff had made previously on promissory notes and what securities had been taken, and what rate of interest was charged. Cousins-Hardy,

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M.R., quoted with approval the dictum of Lord Esher set out above and said that it seemed to him that the facts which were the subject of the interrogatory were substantially relevant to the existence or non-existence of the fact whether the plaintiff was a money-lender, and Lord Justice Buckley agreed with the Master of the Rolls.

Mr. Justice Rose, in *Colter* v. *McPherson*, 12 P.R. 630, gives a wide interpretation to the procedure for discovery. It was an action for malicious prosecution in preferring two charges, one of forgery and the other of obtaining a security by false pretences. The defence averred a conspiracy between the plaintiff and one Jones to obtain two promissory notes (given for hay forks) which were delivered to Jones in pursuance of the alleged fraudulent scheme. On examination for discovery the plaintiff refused to exhibit any entries in his bill book relating to any notes given for forks excepting the notes obtained from the plaintiff. Mr. Justice Rose thought "that the defendant should be permitted to enquire into the dealings between the plaintiff and Jones fully and freely to ascertain whether Jones and the plaintiff were acting in concert," * * * and "that the investigation of transactions with others than the defendant might throw much light on the transaction with the defendant and show whether or not the whole scheme was not bottomed in fraud," * * and "in the interests of justice that there should be a full investigation of the plaintiff's conduct so that the jury may know what manner of person he is who comes before them asking for damages. If he were honest, no injustice would be done, and he would have an opportunity of explaining what may appear equivocal."

I think the plaintiff should be allowed to show the real nature of the bargain the defendant is seeking to establish. It might prove to be an exchange of something of substantial value for something that is worse than valueless. It is true the price or cost is not a fact directly in

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issue, but it is relevant to the existence or non-existence of the facts directly in issue. It is material, pertinent and relevant to the proof of the questions in dispute. If the matter as to which discovery is sought may be directly or indirectly material for arriving at a decision the party examined ought to give the discovery.

I think the questions are in the direction of seeking information that may be useful to the tribunal which will finally decide the matters in dispute. I think the questions should be answered. The appeal should be allowed.

HOWELL, C.J.M., and RICHARDS, J.A., concurred with PERDUE, J.A., and CAMERON, J.A.

Appeal dismissed.

IN THE COURT OF APPEAL.

BRANDON GAS AND POWER CO,

v.

BRANDON CREAMERY CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, J.J.A.

Contract—Construction of contract—Supply of gas—Implied obligation.

After negotiations between the plaintiffs, a gas company, and the defendants who required power to run their creamery, the plaintiffs offered to extend their mains to the defendants' premises and put in service pipes and meters free of charge and to supply "all" artificial gas for power purposes to the defendants for the term of five years at rates specified which varied from $1 per 1000 cubic feet, in case the defendants' consumption should fall below 400,000 cubic feet per month, to 75 cents in case the average consumption per month should reach 500,000 cubic feet for any one year.

Defendants having formally accepted this offer, plaintiffs extended their mains and supplied gas to defendants who continued to take and use it for a time, but then set up their own machinery for making gas and refused any longer to take gas from the plaintiffs or to pay for it.

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Held, that the proper construction to be put upon the contract was that, for five years, the plaintiffs agreed to manufacture and supply to the defendants all the gas which they would use for power purposes in their factory and that the defendants agreed that they would take from the plaintiffs all the gas which they would use for that purpose during that period, and that the plaintiffs were entitled to judgment for the damages sustained by the defendants' breach of the agreement.

The Queen v. *MacLean*, (1884) 8 S. C. R. 210; *Kenney* v. *The Queen*, (1882) 1 Ex. Ct. R. 68, and *Wood* v. *Miners*, (1849) 7 C. B. 905, followed.

Per CAMERON and HAGGART, JJ.A., dissenting.

There was no express stipulation that the defendants should take from the plaintiffs all the gas they might use for power purposes during the next five years and no such stipulation should be implied. The plaintiffs had made their offer without providing for the contingency that had happened and the defendants, having simply accepted the offer, were free at any time to refuse to take or pay for any more gas from the plaintiffs.

Aspdin v. *Austin*, (1844) 5 Q. B. 684, and *Hamlyn* v. *Wood*, [1891] 2 Q. B. 491, followed.

DECIDED: 20th November, 1912.

THE plaintiffs brought this action to recover $4,630 for gas supplied to the defendants or, in the alternative, for damages for breach of the contract made between the parties. The defence raised was that the interpretation put upon the contract by the plaintiffs was not the correct one, and defendants brought into court the amount which they considered was owing.

The case was tried at Brandon before Macdonald, J., who entered a verdict for the plaintiffs for the moneys paid into court with the costs up to the time of such payment into court, costs to defendants subsequent to such time to be set off against the plaintiffs' claim.

Plaintiffs appealed.

J. P. Curran, K.C., for plaintiffs, appellants, cited *Reg.* v. *Maclean*, 8 S.C.R. 210; *Wood* v. *Copper Miners' Co.*, 7 C.B. 935; *Aspdin* v. *Austin*, 5 Q.B. 677; *Knight* v. *Waterworks*, 2 H. & N. 10 and *Thorn* v. *Commrs. of Public Works*, 32 Beav. 498.

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Argument.

C. Blake for defendants, respondents, cited *Kenney* v. *The Queen,* 1 Ex. Ct. Rep. 68; *Hamlyn* v. *Wood,* 60 L.J.Q.B. 734, [1891] 2 Q.B. 488; and *Connolly* v. *St. John,* 35 S.C.R. 186.

HOWELL, C.J.M. This case depends solely upon the construction of a contract in writing which is to be gathered from certain letters between the parties and, as this involves a careful consideration of many expressions, I think it well to set out all the letters in full. They are as follows:

Brandon, Man. March 3rd, 1910.

The Brandon Creamery Co'y Ltd.,
City.

Gentlemen:—

In response to your request we have pleasure in submitting the following figures on power. We will supply you with gas in quantities desired, the supply being continuous and unintermittent in quality, at 85 cents per 1,000 cu. feet. This price is based on the nominal figure of 16 cubic feet per indicated horse power, so that with a 65 h.p. engine on the basis of sixteen hours per day, full load, would bring the cost per month to approximately $425.00. This figure would probably vary somewhat with an engine of power mentioned, the variation being in all likelihood in your favor. We would extend our main and instal the service entirely free of charge.

We will be glad to enter into any further conference and give any further figures you may desire.

Yours very truly,

THE BRANDON GAS & POWER CO'Y LTD.
Geo. H. Harper, Chief Engineer.

Brandon, Man. March 15th, 1910.

The Brandon Creamery Co. Ltd.,
City.

Gentlemen:—

Regarding our telephonic conversation of this morning we now confirm our price of Seventy-eight (78) cents per One Thousand (1,000) cubic feet for gas consumed. I proposed a 65 h.p. engine. This price is based upon a more or less intermittent development of the full horse power of the engine, in other words an inconstant load. In the event of the engine running at full load for ten hours a day and continuously on every working day we could, in all probability, reduce the above price to Seventy-five (75) cents per one thousand cubic feet.

Yours very truly,

THE BRANDON GAS & POWER CO'Y LTD.
per. Geo. H. Harper, Chief Engineer.

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HOWELL, C.J.M.

Brandon, Man. April 1st, 1910.

The Brandon Creamery Co'y,
City.

Gentlemen:—

Confirming our letter of March 15th. we will supply your firm with all artificial gas for power purposes at the rate of Seventy-eight cents (78c) net per One Thousand cubic feet. The above price is based upon a minimum consumption of Four Hundred Thousand (400,000) cubic feet per calendar month, the average consumption per month for the whole year being the basis of computation.

Should the consumption of gas during any one month fall below Four Hundred Thousand (400,000) cubic feet the total amount of gas consumed, in any, and every such month, shall be charged at the rate of One Dollar ($1) net per One Thousand cubic feet, but without prejudice to adjustment at the end of each year, upon the basis of the minimum average consumption per month for the year as already provided for.

Should the average consumption per month for any year reach Five Hundred Thousand (500,000) cubic feet or over the price charged will be Seventy-five cents (75c) per One Thousand cubic feet, and if in any month in any year of the lifetime of this contract, the consumption of gas shall reach Five Hundred Thousand (500,000) cubic feet or over, such gas shall be charged at the rate of Seventy-five cents (75c) per One Thousand cubic feet subject to final adjustment, as already provided for.

All bills for gas to be paid on or before the Fifteenth (15th) day of the month next succeeding that for which such bills are rendered.

This Company will instal all necessary mains, service pipes and meters free of charge and guarantees an adequate and continuous supply of gas.

The time during which the terms above set forth shall —if accepted— be the basis of agreement between your firm and this Company, shall date from the First day of May next, and be in continuous and uninterrupted effect for a period of Five (5) years, when its terms would be subject to review and modification to meet the then existing conditions.

IN WITNESS WHEREOF, the Company hereto affixes its name and seal this, the First day of April, A.D. Nineteen Hundred and Ten.

THE BRANDON GAS & POWER CO'Y LTD.

(Seal) Per. Geo. H. Harper,
Chief Engineer.

WITNESS: A. Edna Laidlaw.

Brandon, Man. April 7th, 1910.

The Brandon Gas and Power Co. Ltd.,
City.

Gentlemen:—

We beg to acknowledge your letter of the 1st inst. quoting rates on gas for power purposes, for a period of five years.

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HOWELL, C.J.M.

We hereby accept your offer to supply gas for power at the rates and under the conditions named therein.

IN WITNESS WHEREOF, the Company hereto affixes its name and seal, this, the Seventh day of April A.D. Nineteen Hundred and Ten.

THE BRANDON CREAMERY & SUPPLY CO. LTD.
Per L. A. Race,
President.

(Seal)

Brandon, Man. April 7th, 1910.

The Brandon Gas and Power Co. Ltd.,
City.

Gentlemen:—

Herewith we enclose acceptance of your offer to supply gas for power purposes as per your letter of the 1st. inst.

We expect to be ready for connection with your mains by May 10th. next, and would thank you to make preparation for the same.

Yours truly,
THE BRANDON CREAMERY & SUPPLY CO. LTD.
L. A. Race,
Mgr.

The plaintiff's letter of the 1st April and the defendant's letter of the 7th April are really executed under seal and with a certain amount of formality, which would lead one to conclude that they were the final letters constituting the contract. The letter of the 15th March, being referred to in the plaintiff's letter, it seems to me may be read as explaining, if explanation is required, some of the terms of the final contract. The letter of the 3rd of March, being really in the series of which the 15th March was one, it seems to me, is as much involved in this case as the advertisements and tenders were involved in the case of *The Queen* v. *MacLean*, 8 S.C.R. 210, and I think this letter might be read for the purpose of explaining any ambiguity or doubt which might exist in the contract.

The plaintiff's letter of the 1st April sets forth clearly what the parties were contracting for, or, in other words, what the plaintiff wished to sell and what the defendant wished to purchase. It is described in the following language: "We will supply your firm with *all* artificial gas for power purposes." Reading those words in the

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light of the environment, it seems to me that the plaintiff says: "You have informed us that you intend to work your plant by artificial gas. We offer to sell you all the artificial gas you will require, and, if you will take from us all that gas, we will lay down pipes to convey the same to your factory, and will so enlarge our own plant that we shall be able to meet all your requirements, and we undertake and agree to continue this arrangement for five years, and will charge you the reduced prices set out in the letter."

The defendant's position is that, "While you made that offer, all we agreed to do was to take that gas if we chose. You are to incur all that expenditure and to be ready to supply us, but we reserve to ourselves the right to take gas for power purposes from a rival concern, or make it ourselves, and we never agreed and did not intend to agree ever to take one foot of gas from you."

In each of the three letters of the 3rd March, 15th March and 1st April, the plaintiff states that the reduced prices are based upon a certain consumption of gas, and it is plain by a perusal of these letters that the plaintiff, at all events, expected and intended that the defendant would use a very considerable quantity of gas during the whole of that period.

One can hardly understand why the plaintiffs would incur the large initial expense of connecting their works with the defendant's factory and of greatly reducing the price below what they were getting from other customers, if they did not expect and intend to secure a customer who would continue to use their gas to the exclusion, at all events, of all other gas, for the period of five years. And it almost shocks one's common sense to think that they would enter into a contract to supply gas commencing at a future date and to incur a large initial expenditure, without the defendant being bound to take one cubic foot of gas, for, if the defendant's contention is

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correct, then, immediately after the plaintiff had made the connection and had gone to the expense for manufacturing this extra supply, they could have then said, "We have changed our minds; we will not take any gas from you at all. We intend to manufacture gas ourselves, or we intend to take it from a rival concern."

It is argued that, suppose the defendant company went out of business, then were they bound to take this gas, or suppose they changed their mind and concluded to operate their power by steam or electricity, were they, in that event, bound to take gas under the contract? The answer to these arguments is that the plaintiffs chose to take that risk, and did not provide for the contingency. They might have felt so secure in their idea that gas would be used for motive power that they were willing to take the other risks.

In *The Queen* v. *MacLean,* above referred to, the Queen's Printer called for tenders for printing. MacLean tendered for the whole printing. An agreement was executed between him and the Queen's Printer, whereby he agreed to do all the work, but there was no covenant or agreement on the other side that they would give him all the work to do. It was decided that MacLean was entitled to do all the work over which the Queen's Printer had control. In giving judgment in that case Chief Justice Ritchie uses the following language: "Where words of recital or reference manifest a clear intention that the parties should do certain acts, the Court would infer from them an agreement to do such acts, just as if the instrument had contained an express agreement to that effect."

In *Kenney* v. *The Queen,* 1 Can. Ex. R. 68, the advertisement calling for the tenders was simply for the handling and moving of steel rails without stating whether it was for the whole or for any part of the work. The plaintiff's tender was accepted, and a document was

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drawn up between an agent of the Minister of Public Works and the plaintiff and, in that contract, the plaintiff agreed to remove all steel rails that were landed from sea-going vessels on the wharves in Montreal for the Dominion Government to a certain place on the Lachine Canal. There was no corresponding agreement by the Government or its agent that they would permit him to move all those rails; but, without hesitation, the Court held that the Government was bound to allow him to remove all those rails, and damages were given in his favor because, after removing part of the rails, he was not allowed to remove the remainder.

In the case of *Wood* v. *Miners,* 7 C.B. 905, the plaintiff agreed that all the small coals required in their manufactory during the term of 12 years should be purchased from the defendant company, "provided the said company can and shall supply him with a quantity that shall from time to time be required by him, or to such extent as the said company can supply." The defendants, after supplying this coal for a time, refused to further supply it, and there was no agreement in the contract upon their part that they would so supply the coal; but the court had no difficulty in holding that they would imply in that contract an agreement that the defendants should supply that coal up to their ability.

In that case, at page 935, Wilde, C.J., used the following language: "There must be two parties to a transaction to make it enure as a purchase. When two persons mutually agree that one of them shall purchase goods of the other, that amounts to a contract that one shall sell and the other shall buy."

This principle is also referred to in *Thorn* v. *Commissioners of Public Works,* 32 Beav. 490.

I think the true agreement between the parties in this case was that, during the period of five years thereafter, the plaintiffs agreed with the defendants that they

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would manufacture and supply to the latter all the gas which the defendants would use for power purposes in their factory, and that the defendants agreed that they would take from the plaintiffs all the gas which they would use for that purpose during that period.

In breach of their agreement the defendants have set up on their premises machinery for making and have made artificial gas, and have used and are using that artificial gas for power purposes. I think the defendants have committed a breach of their contract, and that the plaintiffs are entitled to the damages they have sustained thereby.

The verdict entered for the defendants by the trial Judge should be set aside and judgment entered for the plaintiff. The matter should be referred to the Master at Brandon to find what damages the plaintiffs have sustained by reason of the breach of this contract. The plaintiff should have the costs of the trial and of this appeal, which will be costs in the cause to the plaintiff in any event of the cause. The costs of the reference to the Master will be reserved to be disposed of on further directions after the Master's report.

RICHARDS, J.A., and PERDUE, J.A., concurred with Howell, C.J.M.

CAMERON, J.A. The signed and sealed letters of April 1st from the plaintiff to the defendant (with the unsealed letter of March 15 incorporated therein) and of April 7th from the defendant to the plaintiff comprise the contract between the parties.

Under that contract the Gas Company agrees to supply the defendants with gas:

A. If the minimum consumption be at the rate of 400,000 feet per month (the average per month for the year being the basis) the charge is to be 78c. per 1,000 feet.

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B. If the consumption fall below 400,000 feet per month, the charge is to be $1.00 per 1,000 feet.

C. If the consumption exceed 500,000 feet per month the charge is to be 75c.

Bills are to be paid monthly and, in the event of either B. or C. happening, a final adjustment is to be made at the end of the year on the basis of the average consumption per month during the year.

So far all this seems perfectly reasonable and intelligible. There is a fixed minimum. If the consumption per month exceed this the cost is less, if it fall below that the cost is greater. In either event a final adjustment is to be made each year.

But there is to be found in the second line of the plaintiff's letter the word "all" before the words "artificial gas" and it is urged that this involves and conveys the idea that the plaintiff was to furnish all the gas the defendant might use for power purposes, and in return the defendant agreed to take all the gas it might use for those purposes from the plaintiff. But, if such was the intention of the plaintiff company when entering into the contract, it might readily have stated in its letter that "This offer is made on the understanding that you take all the gas you may use for power purposes from us." It is urged that this omitted term must be implied from the documents and the circumstances of the case.

No mention whatever is made, in the letter of April 1, of the possible event of the defendant's ceasing to take gas from the plaintiff. So far as the writings go that contingency was not considered or contemplated. The conclusion naturally to be drawn from the absence of an express condition would be that the defendant would not be called upon to pay for gas it did not get. If the plaintiff or the parties had a different intention, it may reasonably be contended that it should have been conveyed clearly to the defendant, and not left to be extracted by implication.

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No doubt uncertainty in the interpretation of this contract largely arises from the use of the word "all" referred to above. It is, however, at least as readily susceptible of meaning "all that you may actually take from us" as "all that you may use from any source." The letter of April 1 was the offer of the plaintiff company, prepared after deliberation. If it means what the plaintiff contends, that meaning does not appear on its face, and it does not appear from the reply that the defendant so understood it. "We accept your offer to supply gas" is a different thing from saying, "We accept your offer to supply, and we agree to take from you, all the gas we may need or use in our business."

In any event, it seems to me difficult to give the document of April 1 the construction contended for by the plaintiff without reading into it words that are not there. And I think I can fairly say that the defendant was justified in taking the plaintiff's offer in the sense that it (the defendant) was to pay for what it actually got and no more. The ordinary man reading the offer would hardly, without some further suggestion, think that upon acceptance of it he might be binding himself to pay for gas at the rate quoted whether he took it or not. If that suggestion were made to him he would probably say: "They cannot really mean that, or they would positively say so. They say no such thing in this letter of April 1."

From the authorities cited to us, I quote the following as bearing on the subject before us:

"Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service

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in fact continued, yet neither party might have been willing to bind themselves to that effect," per Denman, C.J., *Aspdin* v. *Austin*, 5 Q.B. 684.

The rule of construction is thus laid down by Lord Esher in *Hamlyn* v. *Wood*, [1891] 2 Q.B. 491: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such (implied) stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist." In his judgment in the same case Lord Bowen comments on the futility of examining decisions in cases of this kind. Lord Justice Kay says, at p. 494: "When parties have put into writing the terms upon which they agree, it is a dangerous thing lightly to imply what they have not expressed," which is substantially a repetition of Lord Denman's remark quoted above.

The subject is dealt with in *Halsbury's Laws of England*, vol. VII, sec. 1035. A condition not expressly stated may be implied if it is clear the parties must have intended such a condition to be a part of the agreement. Such an implication must be founded on the presumed intention of the parties and on reason. "It is not enough to say that it would be reasonable to make a particular implication, for a stipulation ought not to be imported into a written contract unless, on considering the whole matter in a reasonable manner, it is clear that the parties must have intended that there should be the suggested stipulation," citing Lord Esher in *Hamlyn* v. *Wood*, p. 491. Each case depends on itself, however, and it is neither possible nor desirable to lay down hard and fast rules on the subject.

The covenant sought to be implied here is one that the defendant shall take all the gas to be required and used for power purposes for the term of five years from the

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plaintiff. It is quite reasonable to suppose that both parties were under the impression that the defendant would take all its gas for power purposes from the plaintiff during the entire term, and yet the defendant might have been, for various reasons, unwilling to bind itself in that respect: "It is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the Court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written: the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application," per Denman, C.J., *Aspdin* v. *Austin, supra.*

Here the plaintiff offered to supply the defendant with gas, at prices based on the estimated consumption, for a term of five years. The basis of the contract is the actual consumption of gas estimated beforehand. The plaintiff undertook to make necessary expenditures to put itself in a position to carry out its part of the contract. Yet it was amongst the possibilities that the defendant at any time during the five years might dispose of its business and plant, or might find the business unprofitable and cease to carry it on, or might become insolvent, or, for some other season, might wholly discontinue the use of gas. These possibilities of the future are in the nature of business chances common to all similar transactions, and are risks the importance of which is lessened as the business is extended. They were such chances as the plaintiff might reasonably take if it wished to develop its business. What the plaintiff practically said was: "You accept our offer and that is enough for us. We will then

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incur the necessary initial expenditure and furnish you with the gas you wish to take from us, and we will assume any further risks in the matter there may be. All we ask is that you pay for the gas consumed at the rates given." To this the defendant assented; but what would have been the answer if it had been informed by the plaintiff: "In addition to your liability to pay the bills for gas used you also become liable, when you accept this offer, to pay $312 every month, if you use gas for power purposes, but do not take it from us"; or, "You will be liable to that extent every month if you use electricity for power purposes, or if you give up the use of gas for power purposes altogether"? It can be readily imagined that the defendant, in such circumstances, would refuse to accept the offer. How then can it be said that such a condition can, and must necessarily, be implied?

Taking it that the contract is based wholly upon the actual consumption of gas as estimated, and that no provision is made for the contingency which has arisen in which no gas whatever for power purposes is consumed by the defendant (and it does not matter whether this omission is intentional, or inadvertent), the contract is, nevertheless, effective as it stands. The defendant then remains liable for whatever gas it consumes at the rates fixed. And that the actual consumption of gas is the basis and the whole basis of the contract appears to me clear enough. In the first paragraph of the letter of April 1, we find the "minimum consumption" and the "average consumption" referred to, in the second we find "consumption of gas" and "gas consumed" and in the third "average consumption" and "consumption of gas." There is no provision whatever for a total cessation of consumption by the defendant. But, without any conditions on the defendant's part to continue in business for the whole term and to be responsible in any event for a minimum consumption even if there be no consumption

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at all, there is a perfectly good and effective contract. "If the contract is effective without the suggested term, and is capable of being fulfilled as it stands, an implication ought not to be made;" *Halsbury, Laws of England,* VII, sec. 1035, citing Bray, J., in *Consolidated Goldfields* v. *Spiegel,* (1909) 25 T.L.R. 277.

It is contended that, inasmuch as the plaintiff agreed to go to considerable expense to instal all necessary mains, etc., and offered to supply gas to the defendant according to a scale of prices based upon the large quantities that would be used under the contract, it must follow that the defendant, on its part, bound itself (not expressly, but impliedly), if it did use gas for power purposes, to take it from the plaintiff and from no other source.

This contention, however, is, to my mind, undermined by the consideration that, if it be correct, then, if the defendant utilized any other motive power than gas, there would and could be no breach of the implied contract. And yet all the considerations of initial expense agreed to be incurred and of low prices quoted, based upon the assumption of the use of large quantities, apply with just as much force in the case of the defendant's use of another motive power than gas as, in this case, where the defendant manufactures its own. And it seems to me, further, that these considerations would apply with equal force if it were contended that there must be implied a covenant on the part of the defendant that it should continue in business during the existence of the contract for the purpose of fulfilling its part thereof. That is to say, the arguments derived from the agreement to undertake the necessary expenditure, and the fixing of a scale of prices founded on the assumption of the consumption of large quantities of gas contemplated by the contract, apply as strongly in favor of (*a*) an implied covenant to use no other motive power than gas supplied

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by the plaintiff, and (*b*) an implied covenant to continue in business so as to be able to take the gas supplied by the plaintiff, as in favor of (*c*) an implied covenant that, if gas is used by the defendant as a motive power, no other than that of the plaintiff shall be used by it.

The fact is that such an implied covenant as that to continue in business would be "tremendously strong" and "beyond all bounds" as was said of a similar contention by Lord Esher in *Hamlyn* v. *Wood, supra,* p. 493. Nor do I consider that either (*a*) or (*c*) would be assumptions, in any material degree, less strong than (*b*). They are based upon the same grounds as (*b*), and, to my mind, neither of them, at the time of the contract, was in the contemplation of the defendant, and it does not seem to me reasonable to hold that the plaintiff was or is entitled to assume that either of these unexpressed conditions was in the defendant's contemplation.

The essence of the contract in question is not a covenant, on the one part, to deliver all the gas required and a covenant, on the other, to take it, but a covenant, on the one side, to supply gas as required on the terms mentioned and a covenant, on the other, to pay for gas actually taken on those terms. In this view I cannot help thinking that there was a complete and effective contract in writing for all the purposes the parties had in contemplation. Therefore there is no need to resort to conjecture to supply any supposed missing term.

It is to be noted that the contract on the part of the plaintiff to supply gas is absolute. From destruction of plant by fire or from some other cause the plaintiff might at any time be incapacitated from fulfilling its contract. No provision is made to provide for this contingency. Were such a contingency to arise would the court be called upon to insert in the contract a term safeguarding the plaintiff in this respect? I think that would not be seriously advocated. The parties chose to omit that term

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from the agreement and they must stand by that document.

Upon the best consideration I have been able to give this matter (which I find of no little difficulty) my conclusion is that it is not clear, from the documents and the circumstances of the case, that the parties must necessarily have intended that the suggested stipulation should exist, and that, therefore, it should not be imported into the written contract. There is no breach here of that written contract, and it is a dangerous thing to imply what has not been expressed, and it will not be implied unless "the Court is necessarily driven to the conclusion that it must be implied." I would dismiss the appeal.

HAGGART, J.A. It is the business of the plaintiffs to procure gas consumers and offer inducements.

With deliberation in a carefully considered letter over the signature of the chief officer and the corporate seal the offer is made and after the lapse of a week, in an equally formal way, that offer is accepted.

Does that written offer and acceptance express the intention of the parties, or must we imply a promise by the defendants to purchase not less than a certain quantity of gas every month?

In construing a contract a term or condition not expressly stated may be implied by the Court, but it must be clear that the contracting parties intended such term or condition to be a part of the agreement.

The absence of such a stipulation in this offer may have been the inducement to give the acceptance.

Observe the terms: "We will supply your firm with all artificial gas for power purposes at the rate of," etc. This is the offer accepted. "All . . . gas for power purposes." All the defendants want? All they may take from the plaintiffs? All the defendants may demand? Does this express or imply a prohibition against getting

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gas from other sources or manufacturing it? There is not an express promise to take any certain quantity. Must we imply a promise or prohibition?

The price is fixed by the quantity taken. If more than 500,000 cubic feet, 75c. per 1,000; if more than 400,000, 78c.; if less than this, $1.00. It seems to me that the increased price for the smaller quantity is all the plaintiffs can rely upon. This is the provision in anticipation of the defendant's future increasing or decreasing necessities or demands.

Under the circumstances I do not think it is for the Court to reform the agreement. It is for the Court to interpret what the parties themselves carefully and deliberately put in writing.

The appeal should be dismissed.

Appeal allowed and judgment entered for plaintiffs.

IN THE COURT OF APPEAL.

BATES v. KIRKPATRICK.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Banks and Banking--Bank Act, R.S.C. 1906, *c.* 29, *s.* 76, *s-s.* 2 (c), *s.* 80--*Taking chattel mortgage to secure contemporaneous loan.*

If the manager of a bank, at the time of making a loan, stipulates that the borrower shall give a chattel mortgage to secure the debt, although the mortgage is not executed until three days after the money is advanced and demand notes taken therefor, the transaction should be held to be a colorable one to evade the provision in sub-section 2 (c) of section 76 of the Bank Act, R.S.C. 1906, c. 29, which says that a bank shall not, either directly or indirectly, lend money or make advances upon the security of any goods, wares, or merchandise. Such a mortgage cannot be supported under section 80 of the Act as being one taken by way of additional security for a debt contracted to the bank in the course of its business, and should be declared void and set aside at the suit of the assignee of the mortgagor suing on behalf of the creditors.

Bank of Toronto v. *Perkins*, (1882) 8 S.C.R. 603, followed.

DECIDED: 24th October, 1912.

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Statement.

THIS suit was instituted by W. H. Bates, assignee of D. W. Kirkpatrick, suing on behalf of creditors, against D. W. Kirkpatrick and the Union Bank of Canada.

It was brought to set aside a chattel mortgage made by D. W. Kirkpatrick to the Union Bank as having been made in violation of the Bank Act, R.S.C. 1906, c. 29, s. 76, s-s. 2 (*c*).

The following judgment at the trial was delivered by

MACDONALD, J. At the conclusion of this case I found as a fact that the money was advanced by the defendant Bank on the understanding and agreement that a chattel mortgage would be given as security additional to a note, and that the demand note was given for the purpose and with the intention of creating an indebtedness for which the chattel mortgage would be given.

When Kirkpatrick was introduced to the Bank manager by a mutual friend, the latter was asked by the manager if he would endorse for Kirkpatrick and, not receiving any reply, he then asked the latter if he would give a chattel mortgage, to which he agreed. Kirkpatrick was then requested to call upon the Bank's solicitor and give him particulars and description of the chattels for the purpose of having chattel mortgage prepared, which he did.

The Bank manager called upon this solicitor the same evening to see if he had obtained particulars from Kirkpatrick, and to further instruct him with respect to the chattel mortgage.

The money was advanced three days before the chattel mortgage was executed, and at the time of its execution a note was given as collateral at three months; and, although the chattel mortgage was not executed for three days after the moneys were advanced, yet instructions for its preparation were given on the day before the money was advanced.

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The chattel mortgage was, therefore, clearly understood by and in contemplation of the parties at the time of the agreement to advance the money and as security for such advance.

The demand notes were given to create an indebtedness for which it was considered that three days afterwards a chattel mortgage could be given as for an existing past indebtedness; clearly a colorable transaction to evade the provisions of section 76, s-s. 2 (*c*), of chapter 29, R.S.C., 1906, known as The Bank Act, under which a bank shall not, either directly or indirectly, lend money or make advances upon the security of any goods, wares and merchandise.

It is urged by counsel for the Bank that, under section 80 of the Act, the Bank can take this security by way of additional security for debts contracted to the Bank in the course of its business.

The circumstances disclosed here do not bring the Bank within this section. It was never intended to advance the money on the demand notes. Kirkpatrick needed some considerable time for the repayment of the moneys, and it was the understanding that reasonable time would be given, but not until the chattel mortgage was executed would such time be fixed. The demand notes were simply a temporary arrangement and the real transaction would follow on the execution of the mortgage.

Where security is given to cover a contemporaneous loan, and in my opinion that is the effect of what was done here, it is a contravention of the section of the Bank Act above cited: *Bank of Toronto* v. *Perkins,* 8 S.C.R. 603.

It is not in the course of business for a bank to advance moneys on demand notes with a contemporaneous agreement that a chattel mortgage is to be given as security as soon as the same can be prepared, and then take the

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position of mortgagees taking additional security for a past due indebtedness.

The moneys would not have been advanced had it not been agreed that the security was to be given. I cannot therefore see it in any other light than that the security was actually for a present advance and, therefore, in contravention of the Bank Act.

The defendants seized and sold the goods and chattels mortgaged, realizing in gross the sum of $1520.10. The auctioneer's fees reduced this amount to $1457.10, for which latter amount there will be judgment for the plaintiff together with costs.

The defendant, the Union Bank, appealed.

A. E. Hoskin, K.C., for defendant, the Union Bank, appellant, cited *Commercial Bank* v. *Bank of Upper Canada,* 7 Gr. 250; *Bank of Toronto* v. *Perkins,* 8 S.C.R. 603; *Rolland* v. *La Caisse,* 24 S.C.R. 405, and *National Bank of Australasia* v. *Cherry,* L.R. 3 P.C. 299.

J. P. Curran, K.C., for plaintiff, respondent, was not called upon.

THE COURT dismissed the appeal with costs.

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EMPIRE SASH & DOOR CO. v. MCGREEVY.

C.P.R. GARNISHEES.

Before GALT, J.

Garnishment—Debts accruing but not payable at date of service of order—Money payable under building contract—Certificate of engineer as condition precedent—Foreign Court proceedings—Place of payment.

This was a contest in the nature of an interpleader issue to decide who were entitled to the money, $2426.44 paid into court by the garnishees under an order of the Referee made upon the application of the plaintiffs for an order for payment to them of the amount owing by the garnishees to the defendant. The plaintiffs had served their garnishing order before judgment on 29th May, 1911, and had obtained judgment on July 10, 1912, for $4765.47.

James M. Eaton claimed part of the money in court under a garnishing order dated June 17, 1911. Other parties made claims under garnishing orders subsequently issued in the Courts of Alberta, none of which had been brought to judgment there. The defendant, while he was earning the money paid into court by the garnishees, was a resident of Winnipeg and so continued. The contracts between him and the garnishees were for the erection of certain buildings some in Manitoba and some in Alberta. They did not specify any place of payment; and, although they provided for certificates from the company's engineer for payments by instalments as the work progressed, the material before the Judge did not show whether or not the certificate of the engineer was to be a condition precedent to the moneys becoming payable.

It appeared from the affidavit filed on behalf of the garnishees that the defendant had in April, 1911, made default in completing two of the three contracts in question, and had then completed all the work which he ever performed under any of the contracts, and that the company's engineer had, in August, 1911, given three separate certificates in favor of the defendant for sums aggregating $2916.44 payable to the defendant under the contracts.

Held, (1) Following *Gullivan* v. *Coutelon*, (1907) 16 M. R. 644, that the moneys earned by the defendant were all payable in Winnipeg.

(2) The moneys, having been paid into court here, could not be affected by any legal proceedings in a foreign court.

(3) It is not essential that the debt to be attached should be one for which an action could be brought at the date of the order.

MacPherson v. *Tisdale*, (1885) 11 P. R., per Boyd, C. 263, followed.

(4) All the moneys earned by the defendant under his three contracts with the garnishees should, in view of the attitude taken by the garnishees in not setting up that the defendant was not entitled to any money under his contracts until their engineer gave his certificate, be deemed to have been accruing due at the date of the

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plaintiffs' garnishing order; and, therefore, all the money in court should be paid out to the plaintiffs as their order was first in point of time and their judgment was for a larger amount. 1912

DECIDED: 6th November, 1912.

INTERPLEADER application. The facts as disclosed by the affidavits and orders filed are shortly stated in the judgment. Statement

E. F. Haffner for plaintiffs cited *Benfield* v. *Stephens*, 17 P.R. 339.

W. C. Hamilton for J. M. Eaton, a garnishing creditor.

A. E. Bowles for The Aldridge Co.

GALT, J. Under a contract made by the defendant with the garnishees, dated April 14th, 1910, the defendant agreed to construct a railway station in the town of Cornwall for the sum of $4,083, payable in instalments as the work progressed, and on the certificate of the engineer of said garnishees. On April 19th, 1910, the defendant agreed with the garnishees to construct certain section houses in the Province of Manitoba for the sum of $11,273, payable as mentioned in the first contract. On the same day, April 19th, 1910, the defendant also agreed with the garnishees to construct certain section houses in the Province of Alberta for the sum of $15,500, payable as in the case of the former two contracts.

On May 29th, 1911, the plaintiff obtained an order before judgment ordering that all debts, obligations and liabilities owing, payable or accruing due from the above named garnishees to the above named defendant be attached to answer a judgment to be recovered by the above named plaintiff against the above named defendant up to the amount of $4,900.

The defendant apparently completed the work provided for in the first contract and at the date of said order there was accruing due from the garnishees to the defendant the sum of $64 on account of said first contract, which sum was certified by the engineer of the garnishees as the

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final instalment payable in respect of the said work on the 24th day of August, 1911.

After the date of said order, but before the date of the engineer's certificate, James M. Eaton commenced an action against said E. J. McGreevy and on the 17th day of June, 1911, Eaton obtained a similar garnishing order as against both the Canadian Pacific Railway Co. and the Merchants Bank of Canada as garnishees to the extent of $1,471. The interests of the Merchants Bank of Canada were subsequently settled and released and need not be further referred to.

Under the second contract the defendant made default and the Canadian Pacific Railway Co. completed the work themselves about July, 1911, and subsequently, on August 25, 1911, the Company's engineer certified that the sum of $2,136.25 was due under the contract to the defendant.

Under the third contract the defendant also made default and the Canadian Pacific Railway Co. completed the work, and on August 6, 1912, the engineer certified that the sum of $516.19 was due from the garnishees to the defendant.

The plaintiff issued further garnishing orders on the 9th day of October, 1911, the 5th day of January, 1912, and the 6th day of August, 1912, and Eaton issued further garnishing orders on the 10th day of November, 1911, and 14th day of March, 1912.

On or about the 1st day of November, 1911, the defendant McGreevy was sued in the District Court of Calgary in the Province of Alberta by the Downie Aldrich Lumber Co., and the Canadian Pacific Railway Co. were made parties by a garnishing order served on the last mentioned date.

Eaton recovered judgment on 25th June, 1912, for $1,655.40 and the Empire Sash & Door Co., Ltd., recovered judgment on July 10, 1912, for $4,765.47.

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An application was then made on behalf of the Empire Company against the garnishees, and on September 28, 1912, an order was made by the Referee in Chambers that the garnishees forthwith pay into Court to the credit of this cause the sum of $2,426.44, admitted by the garnishees to be due from them to the defendant; and it was further ordered that J. M. Eaton, Edwin Bell, Downie Aldrich Lumber Co., and Cushing Bros. do appear before the presiding Judge in Chambers on the 10th day of October, 1912, and state the nature and particulars of the claim of each upon the moneys so paid into Court. The motion was from time to time adjourned until the 1st day of November, when it came on before me.

It appears that the claims of Edwin Bell, Downie Aldrich Lumber Co. and Cushing Bros. all originated in the Province of Alberta, and none of the claims have been brought to judgment there. The defendant McGreevy, during the period covered by the above transactions, has been a resident of Winnipeg, and still resides here. The contracts made by him with the garnishees do not specify any place of payment.

Having regard to the principle recognized and followed in *Gullivan* v. *Cantelon,* 16 M.R. 644, the moneys are payable in Winnipeg, and the moneys, having been paid into Court here, cannot be affected by any legal proceedings in Alberta.

The only difficulty which presents itself appears to me to be the point of time at which the moneys in question became owing, payable or accruing due from the garnishees to the defendant. Under each of the contracts the moneys were payable in instalments as the work should progress and upon the certificate of the engineer of the garnishees. The material before me does not show whether or not the certificate of the engineer was to be a condition precedent to the moneys becoming payable. The

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affidavit of Joseph Halpenny Jeffrey, the accountant of the garnishees, shows that on the 29th day of May, 1911, the date of the Empire Company's first garnishing order, there was accruing due from the garnishees to the defendant the sum of $64, which sum was certified by the engineer of the garnishees as the final instalment payable in respect of the said work on the 24th day of August, 1911.

In *MacPherson* v. *Tisdale,* 11 P.R. 261, Chancellor Boyd says, at p. 263: "It is not needful that the debt to be attached is one for which an action can be brought in order to bring into play the garnishing process," and various instances are cited by the learned Judge. See also *Tapp* v. *Jones,* L.R. 10 Q.B. 591.

Jeffrey's affidavit also shows that the defaults made by the defendant in his second and third contracts were made in the month of April, 1911, so that the defendant had completed all the work which he ever performed under the contracts prior to the date of the first garnishing order issued by the Empire Sash & Door Co., Ltd.

The attitude assumed by the garnishees in this matter is also material to be borne in mind. They do not and never did take the position that the defendant was not entitled to any money under his contracts until the garnishees' engineer chose to give his certificate. On the contrary, Jeffrey treats the first item of $64 as being in the position of "accruing due" to the defendant at the date of the Empire Company's first garnishing order, although the certificate for it was not given by the engineer until August 24, 1911. I assume that, if the contracts themselves provided otherwise, the parties interested would have produced evidence of this.

Under these circumstances, I think that all the moneys earned by the defendant McGreevy under his three contracts with the garnishees were accruing due from the garnishees to the defendant at the date of the order issued

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by the Empire Sash & Door Co., Ltd., on the 29th day of May, 1911, and, inasmuch as the amount in Court is only $2,430.42, while the plaintiffs' claim is shown by their judgment to amount to $4,765.47, the plaintiffs are entitled to all of the moneys in Court.

The plaintiffs are entitled to their costs of this application as against the other claimants.

IN THE COURT OF APPEAL.

MCCUTCHEON LUMBER CO.

v.

RURAL MUNICIPALITY OF MINITONAS.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, J.J.A.

Municipality—Taxation of personal property—Assessment Act, R. S. M. 1902, c. 117—Injunction—Special Act validating assessments and rates.

This action arose out of a distress of the plaintiffs' chattels by the defendant municipality for alleged arrears of taxes on their personal property, and an interim injunction against sale of the chattels had been issued, as it was shown that there had been many and grave defects and irregularities in the assessment of the property and in the by-laws levying rates owing to non-compliance with the requirements of the Assessment Act, R. S. M. 1902, c. 117.

Before the action came on for trial, the Provincial Legislature passed An Act respecting the Rural Municipality of Minitonas, chapter 38 of 10 Edward VII, containing appropriate recitals in the preamble and expressly validating the assessments and rate by-laws of the municipality for the years in question and providing that "the validity and legality of said assessments and by-laws, levies and taxes shall not be questioned in any action, suit or proceeding in any court on account of any defect or irregularity in said proceedings," etc. No exception of pending litigation was made in this Act which was a Public Act.

Held, that this Act was a declaratory Act and bore evidence upon its face of an intention to make it applicable to all actions or suits, including any then pending, and it should, therefore, be construed to be retro-active in its effect.

Attorney-General v. *Hertford*, (1849) 3 Ex. 670, and *Attorney-General* v *Theobald*, (1890) 24 Q. B. D. 559, followed.

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Held, also, that, by the effect of the Act in question, the defendants had a right to proceed with a sale of the chattels and the action should be dismissed.

Russell v. *Toronto*, [1908] A. C. 493, followed.

O'Brien v. *Cogswell*, (1889) 17 S. C. R. 420, and *Whelan* v. *Ryan*, (1891) 20 S. C. R. 65 distinguished.

DECIDED: 25th November, 1912.

Statement. THIS action arose out of a distress of the plaintiffs' chattels by the Municipality of Minitonas for alleged arrears of taxes, in the course of which distress proceedings the Municipality was restrained from selling by injunction issued in this suit.

The plaintiffs claimed that the seizure was illegal and wrongful, chiefly because the statutory provisions in regard to assessment and the requirements in distress proceedings generally were not complied with, and they prayed for a declaration that there were no taxes in arrears for which distress could be made, for an injunction and for damages and costs.

The defence of the Municipality was to the effect that, at the time of seizure, there were taxes due by the plaintiffs for the years 1905, 1906, 1907 and 1908, and that the provisions of the Assessment Act were observed in assessing and levying the taxes as well as in making the distress.

The action was tried before Prendergast, J., who dissolved the injunction and dismissed the action with costs.

Plaintiffs appealed.

J. B. Coyne and *J. Galloway* for plaintiffs, appellants, cited *O'Brien* v. *Cogswell*, 17 S.C.R. 424; *People* v. *Chautaugua*, 43 N.Y. 16; *Compagnie* v. *Compagnie*, 25 S.C.R. 168; *Holland's Case*, 2 Rep. 76a; *Hitchcock* v. *Way*, 6 A. & E. 943-61; *In re Suche*, 1 Ch. D. 48; *In re Ydun*, [1899] P. 236; *Jones* v. *Bennett*, 63 L.T. 705; *Harding* v. *Queensland*, [1898] A.C. 769; *Atty. Gen.* v. *Stuart*, 2 O.L.R. 403; *Whelan* v. *Ryan*, 20 S.C.R. 65, 71, 6 M.R. 565; *Shaw* v. *Earl of Jersey*, 4 C.P.D. 359;

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Argument.

Hilliard v. *Lenard,* Moo. & M. 297; *Grim* v. *Weissenberg,* 57 Penn. St. 434; *Cowgill* v. *Long,* 15 Ill. 204; *Alloway* v. *St. Andrews,* 16 M.R. 255, and *Anderson* v. *Vancouver,* 45 S.C.R. 425.

C. P. Wilson, K.C., and *W. C. Hamilton* for defendants, respondents, cited *Ryan* v. *Whelan,* 20 S.C.R. 65; *Russell* v. *City of Toronto,* 15 O.L.R. 484, [1908] A.C. 493; *Grim* v. *Weissenberg,* 57 Penn. St. 434; *Cowgill* v. *Long,* 15 Ill. 204; *Atty. Gen.* v. *Hertford,* mentioned in judgment in *Atty. Gen.* v. *Theobald,* 24 Q.B.D. 557; *Hilliard* v. *Lenard,* Moo. & M. 297; *Neal* v. *Rogers,* 22 O.L.R. 588, and *Dom. Express Co.* v. *Brandon,* 19 M.R. 257.

PERDUE, J.A. The plaintiffs were the owners of certain personal property consisting of an engine, boiler and mill machinery, sleighs and wagons, all of which was within the limits of the defendant Municipality. The Municipality assessed this property for taxes for the years 1905 to 1908 inclusive. The taxes not having been paid, the Municipality distrained upon the property for the amount claimed to be due, the defendant Campbell acting as the bailiff or agent of the Municipality in making the distress. The plaintiffs then commenced this action, alleging that there were no taxes due by reason of the non-fulfilment, by the Council of the Municipality, of the requirements of the statutes in regard to the assessment of the property and the imposition and collection of taxes. Breaches of the statutory requirement in each and every one of the years above mentioned were alleged to have been made, the effect of which was, it was claimed, that there were no taxes due upon the property in respect of which the distress could be lawfully made. The plaintiffs asked for a declaration that there were no taxes due or in arrear from the plaintiffs to the defendant Municipality, an injunction to restrain the sale, and damages for illegal distress.

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The suit was commenced on 13th February, 1909, and, while it was pending and before it was brought on for trial, the Legislature of the Province passed an Act, 10 Ed. VII., c. 38, entitled, "An Act respecting the Rural Municipality of Minitonas." The preamble of this Act, which is a public one, recites that doubts had arisen as to the legality of the assessments made by the Council of the Municipality in the years 1901 to 1909 inclusive, and of the by-laws striking the rates and making the levies for these years, and respecting the ability of the Municipality "to enforce payment of the taxes now appearing in the books of the Municipality," as charged against lands, goods and chattels on account of provisions of The Municipal Act and The Assessment Act, relating to assessing, rating, levying and charging of taxes, not having been strictly complied with, and that it was expedient to set such doubts at rest and to legalize and validate such assessments, by-laws, levies and taxes. The Act then goes on to declare that:

"Notwithstanding any defect or irregularity in the proceedings taken in the making of such assessments or passing such by-laws or of assessing, rating, levying and charging of said taxes or in the proceedings prior or subsequent thereto, the said assessments, by-laws, levies and taxes are hereby declared to have been and to be sufficient, valid, effectual and binding as if all such proceedings had been fully and completely carried out according to all the provisions of The Municipal Act and The Assessment Act, but no further or otherwise, the intention of this Act being only to cure all defects in the proceedings aforesaid, and the validity and legality of said assessments and by-laws, levies and taxes shall not be questioned in any action, suit or proceeding in any court on account of any defect or irregularity, in said proceedings, or on account of any provisions of The Municipal Act or The Assessment Act not having been complied with in the making of said assessments or the passing of said by-laws or in the assessing, rating, levying and charging of said taxes or in the proceedings prior or subsequent thereto."

Counsel for the defendant Municipality did not seriously attempt to combat the objections urged against the proceedings leading up to the levy of taxes in each year. The Municipality relied upon, and the argument

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was almost wholly directed to, the effect of the above Act as validating and confirming the assessment and taxation for the years in question.

Counsel for the plaintiffs relied upon the view taken by the Supreme Court of Canada in *O'Brien* v. *Cogswell,* 17 S.C.R. 420, and *Whelan* v. *Ryan,* 20 S.C.R. 65, and since followed in many cases, as to the strictness of construction to be placed upon legislation having for its object the remedying of defects in assessing and levying taxes, caused by non-compliance with the imperative provisions of the statute under which the assessment and levy were made. The above cases and those which followed them in our courts related to sales of land for taxes in which the contest arose between the original owner, or some one claiming through him, and the party who purchased at the sale for taxes. In *Whelan* v. *Ryan,* in order to prevent what it regarded as confiscation of the land-owner's rights, the court placed a very strict, if not strained, construction upon an enactment which was intended to validate the assessments and levies upon which the tax sale was based. Whether the courts would have applied the same strictness of construction, in order to relieve a ratepayer of the Municipality whose personal property had been seized or sold for taxes levied against it, may be open to question.

The present case is a contest, not between the owner and the tax purchaser, but between the municipality and a ratepayer who is seeking to avoid the payment of taxes. The result of the plaintiff's success in this case would be that a considerable sum of money, forming part of the taxes relied upon by the Municipality to provide a revenue for its ordinary purposes, would be lost and a heavier burden would be laid upon the other ratepayers in order to raise money to make good the deficiency. The plain object of the legislation was to cure all defects in the various steps to be taken by the municipality in assessing the property, imposing the taxes and enforcing

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payment of them. Both the preamble and the enacting part show that this was the clear intention of the Act, and the effect of the enactment is expressed in words the meaning of which is unequivocal and cannot be explained away. In order to make its purpose and effect unmistakeably clear, the Act declares that the validity and legality of the assessments, by-laws, levies and taxes shall not be questioned in any action, suit or proceeding in any court on account of defect or irregularity, or on account of non-compliance with any of the provisions of the Municipal Act or the Assessment Act.

The decision of the Privy Council in *Russell* v. *Toronto,* [1908] A.C. 493, is particularly applicable to the present case. There an action was brought by the owner of land against the municipality to set aside a sale for taxes, on the ground of a defect in the description of the land in the assessment roll and of failure to give notice of the sale. An Act of the Ontario Legislature (3 Ed. VII., c. 86, s. 8) had been passed which declared that all sales of land within the City for arrears of taxes, during a period which covered the sale in question, were validated and confirmed, notwithstanding any irregularity in the assessment or other proceedings for imposition of any taxes so in arrear, or any failure to comply with the requirements of the Assessment Acts in regard to the manner in which any assessment roll or collector's roll of the City had been prepared. It was held that the insertion of an insufficient or inaccurate description of the land in the assessment roll was a failure to comply with the requirements of the Assessment Acts which required a description to be inserted which was neither inaccurate nor insufficient; but that this defect, if it existed, came within the very words of the statute and was cured by it. It was further held that, since the main and obvious purpose and object of the Legislature, in passing the Act there under consideration,

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was to validate sales for arrears of taxes where the requirements of the statutes had not been observed, and to quiet the titles of those who had purchased, the Act should, where its words permitted, be construed so as to effect that purpose and attain that object.

Applying the principles laid down in *Russell* v. *Toronto,* I think it is clear that this court must hold that all the defects and failures on the part of the defendant Municipality to comply with the requirements of the statutes in connection with the assessment and imposition of taxes in this case were cured by the Act.

No exception of pending litigation is made in the Act, It was strongly urged that the Act should be construed as if it contained such exception, that there was not a clear intention expressed that it should apply to the present case and that, therefore, this case was impliedly excepted.

In determining whether a statute applies to pending litigation or not, Lord Denman, delivering the judgment of the Court, enunciated the following rule: "We are of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relation of the litigant parties to each other": *Hitchcock* v. *Way,* 6 A. & E. 943, 951. Jessel, M.R., expressed the rule in the following language: "It is a general rule that, when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights": *In re Joseph Suche & Co.,* 1 Ch. D. 48, 50. See also *In re Athlumney,* [1898] 2 Q.B. 547,

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552, and cases collected in *Beal's Cardinal Rules,* 421-424. But, if an Act is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable: *Attorney General* v. *Hertford,* 3 Ex. 670; *Attorney General* v. *Theobald,* 24 Q.B.D. 559.

The Act in question in this case declares the assessments, etc., to have been, and to be, sufficient, valid, effectual and binding and enacts that the validity and legality of the assessments, etc., shall not be questioned in any action, suit or proceeding in any court on account of any defect or irregularity in said proceedings, etc. If the plaintiff's property had actually been sold for taxes and the action had been brought to set it aside or to claim damages for an illegal sale, I think that the Act, being declaratory of the validity of the assessment and other proceedings, would have been construed to be retro-active in its effect, and the intention to make it applicable to all actions or suits, including those then pending, to have been sufficiently clearly expressed. But the present action is not to set aside a sale. An injunction had been obtained restraining a sale, and it is now sought to have the injunction made perpetual and to have it declared that there were no taxes due or owing by the plaintiffs to the Municipality. Even if the Municipality had no right to distrain and sell at the time the action was commenced, the effect of the Act is to give it the right now to take such proceedings. The grounds upon which the interlocutory injunction was granted have disappeared and the plaintiffs cannot, in view of the Act, show any grounds upon which an injunction could be issued restraining the Municipality from proceeding in future to collect the taxes by distress or otherwise.

The Court cannot now find that there were no taxes due or owing by the plaintiff to the Municipality, when the Legislature has declared that there were taxes legally

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imposed, the validity of which cannot be questioned by the Court.

The evidence shows that in one of the years the Municipality, at the request of the plaintiffs, made an abatement of one-half of the taxes because of a fire that had occurred. It is said that the plaintiffs, through their agent, by reason of this, promised to pay the balance. In the view I have taken as to the main contention it is not necessary to deal with this last point.

The plaintiffs had strong grounds to support their contention when the suit was commenced. Grave defects appeared in the assessments or other tax proceedings in each of the years mentioned. Were it not for the Act the proceedings could not, I think, have been upheld. The Legislature intervened on behalf of the Municipality and enabled it to win the suit. I think the trial Judge should, in awarding the costs, have taken into account the fact that the plaintiffs had good grounds for instituting proceedings in the first place and have given them costs up to the time the Act came into force. There has, however, been no leave given to appeal on the question of costs, and no ground has been stated which would give this court the right to interfere with the trial Judge's disposition of the costs. In order to do justice to the plaintiffs in the matter of costs, so far as it lies in the power of this court, I think that, in dismissing this appeal, no costs of the appeal should be given to the defendants.

CAMERON, J.A. A perusal of chapter 38, 10 Edw. VII., being "An Act respecting the Rural Municipality of Minitonas," leads me to the belief that it has the effect of curing the various defects relied upon by the plaintiff as nullifying the proceedings of the defendant Municipality in making the assessments and imposing the taxes in question. The Act is of a curative and remedial character and will be given a liberal construction. The administration of the country is largely carried on

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through the medium of the municipalities, as instrumentalities of government, and for educational and governmental purposes generally money must be raised by taxation. Defects may easily occur in the proceedings necessary to assess property and levy taxes, particularly in municipalities recently organized and the Legislature frequently and properly rectifies these errors. That legislation is not to be regarded as vicious, but, on the contrary, as meritorious and beneficial. And the action of the person, properly liable to taxation in common with others, who undertakes to resist or escape from payment of his share of taxes, and thrust the burden of them on his fellow citizens, is not to be unduly favored by the Court. These principles are to be gathered from the recent case of *Russell* v *Toronto,* [1908] A.C. 493, and, apart from the question of authority, they commend themselves as founded on sound reasoning and on a due regard for the public interest.

Such being the nature of the Act, to be gathered from its provisions, it must affect a matter which is in litigation such as this before us. And, in addition to this, I think the very wording of the statute is such as to make it retro-active to the same extent as if that had been said in express terms. It seems to me impossible to read this Act without coming to the conclusion that it was the intention of the Legislature to make the taxes, as they appear on the books of the Municipality, lawfully due and payable, and to declare that whatever was necessary to make them so lawfully due should be deemed to have been done from the beginning, and that no question arising out of these matters should be raised in any Court. That being clear there must be an end of the case, and I concur in dismissing the appeal.

HAGGART, J.A. The question is, does chapter 38 of 10 Edw. VII. of the Statutes of Manitoba enable the defendant Municipality to collect by distress, under The

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Assessment Act, the taxes which are the subject matter of this suit.

The plaintiffs say that, inasmuch as the Act creates legal rights and imposes legal obligations which did not before exist, it should receive a strict interpretation, that it should not be construed retrospectively, and that, having been passed after the commencement of the action, the presumption is that it does not apply to pending suits.

The defendants contend that it is a remedial Act, a curative statute, and ought to receive a wide and generous construction.

Lord Blackburn in *Caledonian Ry. Co.* v. *North British Ry. Co.*, 6 A.C. on p. 126, in discussing the interpretation of statutes, says:

"The matter turns upon the construction of an Act of Parliament which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing we are to consider what the facts were in respect to which it was framed, and the object as appearing from the instrument, and taking all those together we are to see what is the intention appearing from the language when used with reference to such facts and with such an object."

The preamble clearly sets forth the existing conditions requiring the legislation. It recites the doubts as to the legality of the assessment, and of the by-laws striking the rates and making the levies, and respecting the ability of the Municipality to enforce payment of the taxes now appearing upon the books, on account of certain provisions of the Municipal Act and the Assessment Act relating to the assessing, rating, levying and charging of said taxes not having been strictly complied with; and the operative or enacting clause enacts that the "assessments, by-laws, levies and taxes are hereby declared to have been and to be sufficient, valid, effectual and binding as if all such proceedings had been fully and completely carried out . . . . and the validity and legality of said assessments and by-laws, levies and taxes shall not be questioned in any action," etc.

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In 1908 the manager of the plaintiffs, on account of the mill being burned, applied for a reduction in the amount of taxes, and the Council passed a resolution allowing the same, and the manager agreed to pay the reduced bill. Does not this look like a waiver of any irregularity in the assessment?

The Legislature, when passing the Act, must have had in view the subject matter of this litigation, and must have intended to establish the liability of the plaintiffs for the arrears of taxes, and I think the wording of the statute is wide enough to effect that object, and in express terms the plaintiffs and defendants are relatively placed in the position they would have been in if the Council and their officers had to the letter complied with the provisions of the Municipal Act and the Assessment Act.

Here there is no confiscation, no forfeiture, no sale or deed to declare valid or void, as was the case in *O'Brien* v. *Cogswell,* 17 S.C.R. 420; *Ryan* v. *Whelan,* 20 S.C.R. 65, and the other cases relied upon by the plaintiffs. The declaration that the assessments, etc., have been, and are to be, sufficient makes the statute retro-active and, from the context and surrounding circumstances, it is apparent that the Legislature had in view the circumstances that gave rise to this suit.

The appeal should be dismissed.

HOWELL, C.J.M., and RICHARDS, J.A., concurred.

Appeal dismissed

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IN THE COURT OF APPEAL.

RE MCMICKEN.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Criminal information—Magistrate—Corrupt or improper conduct of magistrate—Trial before magistrate—Private prosecutor.

A private prosecutor who has laid a criminal charge against any one has a right to be present when a magistrate sits to try the charge, so that, if the accused does not plead guilty, he may adduce evidence to prove the charge, and, if the accused pleads guilty, he may be heard as to any extenuating circumstances put forward by the accused in mitigation of sentence or show circumstances in aggravation of the offence, and it is illegal and highly improper for the magistrate to dispose of a charge of a serious offence by accepting a plea of guilty in his private office in the absence of the prosecutor, before the time fixed for the public hearing of the case, without giving him an opportunity of being present: *Stephen, Hist. of Crim. Law*, vol. 1, pp. 494-5.

Illegal and improper acts committed by a magistrate in the exercise of his judicial function will not of themselves justify the court in ordering a criminal information to be exhibited against him, but the court must be satisfied from the evidence that the magistrate had been actuated by some corrupt, dishonest or improper motive in committing such acts.

Rex v. *Borron*, (1820) 3 B. & Ald. 432; *Reg.* v. *Badger*, (1843) 4 Q. B. 468; *Re Fentiman*, (1834) 2 A. & E. 127, 4 N. & Man. 128, and *Rex* v. *Williams*, (1762) 3 Burr. 1317, referred to.

Merely acting from a mistaken view of the law would not be sufficient, though there may be much that is reprehensible and suspicious in the conduct of the magistrate: *Re Fentiman, supra.*

Held, also, (CAMERON, J.A., dissenting) that, though the magistrate had in this case acted improperly and illegally, yet in view of his denial of any corrupt or improper motive and of his affidavit that he did not know that the course he took was illegal, the evidence, set out fully in the report, was not sufficient to show the existence of any corrupt, dishonest or improper motive for acting as he had, and that the rule *nisi* for a criminal information should be discharged, but without costs.

DECIDED : 6th December, 1912.

Statement.

MOTION to make absolute two rules *nisi* calling upon Alexander McMicken, Police Magistrate for the Province of Manitoba, to show cause why a criminal information should not be ordered to be exhibited against him for

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certain alleged misdemeanors charged as having been committed by him while acting as such police magistrate, he well knowing his duty: it being alleged that he had been actuated by corrupt and unjust motives for the purpose of defeating and hindering the administration of justice.

The affidavits filed showed that the applicants for the rules were the same persons as those who had served upon the Magistrate the usual six days notice of their intention to move for the rules.

W. H. Trueman for applicants cited *Reg.* v. *Robidoux,* 2 Can. Cr. Cas. 19; *Reg.* v. *Bushell,* 16 Cox, 367; *Reg.* v. *Dignam,* 7 A. & E. 593; *Rex* v. *Bunts,* 2 T. R. 683. *Stephen's History of Criminal Law,* 419, 495, 561: *Arch. Cr. Pl.* (24th ed.), 152; *Dominion Elections Act,* R.S.C. 1906, c. 6, ss. 272, 301.

C. P. Fullerton, K.C., for magistrate, Alex. McMicken, cited *Reg.* v. *Stanger,* L.R. 6 Q.B. 352; *Rex* v. *Younghusband,* 4 N. & M. 850; *Rex.* v. *Borron,* 3 B. & Ald. 432; *Ex parte Fentiman,* 2 A. & E. 127; *Rex* v. *Palmer,* 2 Burr. 1162; *Rex* v. *Cozens,* 2 Doug. 428, and *Reg.* v. *Brooke,* 2 T.R. 195.

W. H. Trueman in reply cited *Reg.* v. *Brooke,* 2 T.R. 195, *Reg.* v. *Badger,* 4 Q.B. 474, and *Parsons* v. *Crabbe,* 31 U.C.C.P. 151.

HOWELL, C.J.M. Mr. McMicken is a police magistrate for the Province and holds regular, and I gather daily, courts in Winnipeg. He has a regular court room and a clerk who appears from the affidavits to perform the ordinary business pertaining to that office. The affidavits show that the clerk knew that these cases were to come on for hearing at 11.00 A.M. on the 16th of October, and the day previously he granted subpœnas to one of the prosecutors returnable at that hour. Bain, the constable who made one arrest, referred to in the affidavit

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of the magistrate, told one of the prosecutors the day before that the cases would come on for hearing at the hour above mentioned. The clerk of the court knew when the matters were to come up. The constable who brought the informations to the magistrate to be disposed of also knew this fact. The magistrate's affidavit alone was filed; none was filed of the clerk or constable. It seems strange that the magistrate did not ask his clerk how those matters happened to come before him, and equally strange why the constable did not tell him.

The magistrate in his private room took the plea of guilty from each of these two parties, who apparently came in separately in the absence of the private prosecutor, and apparently at separate times heard each explain that he was intoxicated and inflicted on each the same minimum sentence.

Where a magistrate undertakes to dispose of such a matter, his duties are twofold: 1st, to find if the party is guilty or not guilty of the charge; 2nd, to gather the facts and circumstances surrounding the criminal act, so that he may judicially find what penalty should be imposed.

In this, as in most criminal cases, a wide range is given for judicial discretion, the accused might have been punished anywhere between the minimum of $50—that which was imposed—and two years' imprisonment with a fine also of $200. The decision on this question, and the consideration of the facts, is as much the magistrate's duty as that of finding the prisoner guilty or not guilty.

The prosecutor had as much right to be heard on this trial as the Attorney General, and the clear language of *Stephen,* in vol. 1, pages 419 and 495, of *The History of Criminal Law*, on this subject is interesting.

The prosecutor had gone to the expense and trouble of issuing subpœnas and of employing counsel and, when they appeared at the time when the clerk of the magistrate's court told them the cases would be heard, they were

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told by the same clerk that the cases had been disposed of, but the magistrate refused to tell them when the cases had been heard, or what punishment had been imposed. Apparently there were hot words and the magistrate refused to allow the proceedings to be looked at. The rights of the prosecutor had been invaded and his feelings can be imagined.

The accused persons had been caught red-handed in the commission of a crime, and each received the same minimum sentence. According to the magistrate both claimed they were drunk on election day. One might think it interesting to ask from what source the liquor came on a day when it cannot be sold, also to inquire why they chose the names which they sought to vote upon and, possibly, who suggested these names, it might be pertinent to ask how many times they had previously voted that day, and generally if they were criminals or were they simply thoughtless young men committing a first offence. Apparently nothing of this kind was enquired into by the magistrate, and he deprived the prosecutor of his legal right to bring out such facts.

After carefully looking into the whole matter, I cannot get rid of the impression that assumed names have been used and that the guilty parties have not a record of conviction against them, and the gross irregularities shown by the papers filed fill one with suspicion of corrupt intent somewhere.

In the course the magistrate took I think he acted highly improperly and perhaps I might say unlawfully; but he has denied any improper or corrupt intention, and claims that it all arose from want of knowledge of the course to be taken under such circumstances. His course of conduct after the disposition of the case has been urged upon us as evidence of a bad mind and improper or corrupt intent, and there is some authority for this proposition.

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I think, however, in the face of the direct statement by the magistrate, above referred to, I cannot hold that such a case has been made out that we should order the issue of a criminal information, which is in the Court's discretion, and particularly so as the prosecutor's rights, if any, are not thereby judicially disposed of.

The rule must be refused, but I have no hesitation in saying that it should be without costs.

RICHARDS, J.A. This is a motion to make absolute two rules *nisi* calling upon Alexander McMicken, Provincial police magistrate for the Province of Manitoba, and having his office and court at the City of Winnipeg, to show cause why criminal informations should not be ordered to be exhibited against him for certain alleged misdemeanours, charged as having been committed by him while acting as such police magistrate.

These matters first came before this Court in pursuance of notices of application for rules *nisi*. On that application rules were refused, no one appearing for the magistrate, and the Court not being satisfied that the service of the notices at the magistrate's residence, though apparently sufficient according to the English practice, had, under the circumstances shown by the affidavits, given the magistrate six days actual personal notice of the application.

Afterwards other notices of application for rules *nisi* were served upon Mr. McMicken personally. He did not attend personally, or by counsel, upon the return of those notices, and the Court granted the rules, making it a condition that it should be open to him on their return to take any objections which he might have taken on the return of the notices.

The facts appear to be: On 12th October, 1912, at each of two polling subdivisions, at an election held to elect a member to represent the electoral district of Macdonald in the House of Commons of Canada, a party was,

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on the complaint of an agent of one of the candidates, arrested by order of the returning officer, on a charge of having committed the crime of personation.

The parties so charged were taken in custody and lodged in a lock-up at St. James. Apparently they were there admitted to bail by a justice of the peace, and the proceedings against them were, by a justice of the peace, in some way enlarged to come up before Mr. McMicken at his court in Winnipeg, on the 16th of October.

It is alleged that the hour fixed by the justice of the peace, who so transferred the matters to be heard at Winnipeg before Mr. McMicken, was 11 o'clock in the forenoon. There is no record before this Court showing that fact. In each case the private prosecutor was informed of the fact upon inquiry at St. James, or from a St. James constable. It appears that the clerk of the magistrate's court at Winnipeg was aware of that being the hour, though how he learned it is not shown.

There is no evidence that Mr. McMicken knew that these charges existed, or had been transferred, to be heard before him, until he heard of them from Mr. Sullivan, which will be referred to later. There is also no evidence to show that he was aware of the hour at which the transferring justice of the peace had ordered them to come up before him, Mr. McMicken, till after he, Mr. McMicken, had disposed of them as hereinafter mentioned.

On the morning of the 16th at 11 o'clock the two private prosecutors, with their counsel, attended at the Winnipeg court and were informed that the cases had already been disposed of; that the parties had pleaded guilty and that, extenuating circumstances having been shown, each of them had been punished by a fine of $50, and that the fines had been paid.

Thereupon a wrangle took place, and the magistrate

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refused to permit the private prosecutors and their counsel to take copies of documents in connection with the matter.

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The magistrate's own affidavits say that he knew nothing whatever of these cases having been transferred to him for trial or of the hour set for their so coming before him. His story, which has not been contradicted, is that, early in the morning of the 16th, Mr. Sullivan, a barrister practising at Winnipeg, telephoned him stating that he would be unable to attend his court at the usual hour, and that he would therefore like to have two cases in which he represented the accused, and in which the parties were prepared to plead guilty, dealt with before the usual court hour.

The magistrate further swears that, acting upon Mr. Sullivan's request, and knowing nothing of the facts as aforesaid, he attended his court at an earlier hour than his usual one, and that the two cases were brought before him in his private room off the court room, and that the parties there pleaded guilty and claimed that they had been drunk when committing the crime and had not been aware of the enormity of their offence, and that he thereupon fined each of them $50, which is the smallest punishment which, according to law, he was at liberty to inflict.

He swears that he had no corrupt or improper motive in acting as he did, and that he believed that, in dealing with the cases beforehand and in his private room, he was acting within his powers, and that he often took cases in that private room where parties pleaded guilty, and that he supposed that, where parties were prepared to plead guilty, it was not necessary that the prosecutors should be present when the case was dealt with.

It is in the discretion of the Court to order the exhibiting of a criminal information such as applied for; but such order will not be made unless it appears that

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the magistrate was guilty of an illegal act or acts, and that he did such act or acts from corrupt motives.

Section 272 of the Dominion Election Act defines what shall constitute the crime of "personation," and makes the guilty party "liable to a penalty not exceeding $200, and not less than $50, and to imprisonment not exceeding two years, and not less than three months."

When the matter was first mentioned to this Court (that is to say on the return of the notices which the Court did not think properly served) counsel for the informants urged, as an illegal act by the magistrate, that the statute compelled, not only the imposition of a fine, but also of a term of imprisonment which should be not less than three months, and not more than two years; but, when moving for the rule, he abandoned this ground because of a decision by Mr. Justice Wurtele in *The Queen* v. *Robidoux,* 2 Can. Cr. Cas. 19, in which that learned Judge held that, although both fine and imprisonment are provided by statute as a penalty, yet, because of section 1028 of the Code, the Judge may impose one of these penalties only.

The Dominion Election Act, by section 296, says, as to a charge of personation, that the deputy returning officer may, on the polling day, issue his warrant for the arrest of the person charged in order that he may be brought before the magistrate therein named, to answer to the information and to be further dealt with according to law.

Section 300 of that Act provides that the magistrate named in the warrant shall be one having jurisdiction under Part XVI. of the Criminal Code, and section 301 says that the provisions of said Part XVI. of the Code shall apply to all proceedings under the Act against persons accused of personation under the seven preceding sections. These seven preceding sections relate to cases where the accused is charged at the polling station with

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having committed the crime of personation and is arrested pursuant to the warrant of the deputy returning officer then issued.

Part XVI. of the Criminal Code is one relating to the summary trial of indictable offences, and Mr. McMicken is a magistrate who has power under Part XVI. to try such cases as are therein provided for.

Section 787 of the Code, which is included in Part XVI. says: "Every court held by a magistrate for the purposes of this Part shall be an open public court."

Section 680 of the Code, which is included in Part XIV, referring only to preliminary inquiries in the case of charges for indictable offences, says that "the justice may order the accused person to be brought before him . . . at any time before the expiration of the time to which such person has been remanded, and the goaler or officer in whose custody he then is shall duly obey such order." That only refers to the case where a person is in custody, and probably is only for the purpose of enabling bail to be taken. I can see in it nothing to justify the justice's hearing and dealing with the matter in the absence of the private prosecutor in a case under Part XVI of the Code.

If there are other provisions of the Code under which the magistrate might suppose he had power to act as he did, they were not called to our attention by his counsel, and I do not know of them. Sections 644 and 645, providing for the exclusion of the public at trials in certain cases, have no bearing on such a case as this.

There can be no doubt, I think, that, in dealing with the matter as he did, the magistrate exceeded his authority. In addition to the provision of section 787, as to the court being an open public court, there is no question that a private prosecutor has a right to be heard, not only as to the commission of the crime, but as

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to the question of aggravating or mitigating circumstances to be considered by the magistrate in deciding what punishment he will inflict.

In *Stephen's Criminal Law of England,* Vol. I., at p. 494, it says: "If, as is often the case, there is a private prosecutor, he can and does manage the whole matter as he might manage any other action at law. . . .

" The course pursued is precisely the same in all cases, and whoever may be the prosecutor. A prosecution for high treason, conducted by the Attorney-General, differs in no one particular in matter of principle from the prosecution of a servant by his master for embezzling half-a-crown."

And at page 495 it is said: "Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General or any one else."

It is of the utmost importance that courts should be held openly, and that parties preferring charges should have a right to be present when the same are dealt with. In the present case the magistrate should have waited for the arrival of the private prosecutor, at least until the hour fixed for the hearing, and if he did not know the hour, as he says he did not, he should have ascertained it and have seen that it had gone past before dealing with the case in the prosecutor's absence.

The magistrate endeavors to meet this by saying that he did not suppose that, when parties were prepared to plead guilty, it was necessary to have the prosecutor present. It was stated by counsel for the magistrate, although not proved by affidavit, that it is customary to deal, in magistrate's courts, with cases where a party is willing to plead guilty, by accepting that plea before the hour fixed for the hearing of the case. If cases are so dealt with in the absence of the private prosecutor, the so doing ahead of the time fixed for the hearing is a wrongful act on the part of the magistrate. It seems to me that, if there have been such cases, they must have been

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cases where the police had laid informations and were acting as the prosecutors, and where some one representing the police was present at the time the cases were so brought on in advance of the fixed hour.

In any case the magistrate, before exercising his discretion as to the extent of the penalty to be imposed, within the limits provided by law, had no right to hear evidence in mitigation of the punishment without giving the private prosecutor a chance to hear that evidence and cross-examine the parties giving it, and, if necessary, meet it with evidence on his own part in aggravation of the offence, or in contradiction of the alleged mitigating circumstances.

But, as stated above, the fact that the magistrate has acted beyond his jurisdiction and committed an illegal act does not, of itself, empower this Court to grant the extraordinary remedy here asked for. The evidence must be such as to make at least a *prima facie* case of corrupt motive. We can only act on the material in the affidavits and papers before the Court. There is nothing in that which suggests any reason why the magistrate should try to favor the accused or that he acted from fear.

What appears from that material to be relied on as evidence of corrupt motive is, first, the fact of the magistrate having acted beyond his powers in hearing the case before the hour fixed for hearing, and secondly, the wrangle which took place after the prosecutors and their counsel arrived at the court room.

Dealing first with the question of the wrangle. That took place, not at the trial of the case, but after it was over and the matter had been dealt with by the magistrate. I have been unable to find any case which shows that a wrangle under such circumstances is evidence of a corrupt motive.

It is stated in *Archibold's Criminal Pleading*, 153, that,

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in the case of *The King* v. *Manley*, Rowe, Ir. K.B. 646, a corrupt motive was found by the court from the magistrate abusing the prosecutor. The report of that case is not available here; but I can only think that it must refer to unprovoked abusive language used by the magistrate during the trial or hearing. If so, it is not an authority in a case where the wrangle does not occur until after the case has been disposed of.

I am unable to find a corrupt motive from the bringing the case on before the hour fixed, though the magistrate, I think, acted beyond his jurisdiction in doing so. As above stated, he says that he knew nothing of the particulars of these cases until spoken to by Mr. Sullivan, and until he came into the court, and that he never knew the hour at which they had been adjourned to come up before him. I have been unable to find in the meagre records of the case that were before him anything showing this hour; so that, when the matter was brought hurriedly before the magistrate, there was, apparently, nothing to draw his attention to the hour, and his action in the hurry of the moment, if he believed he had the power to act as he did, cannot be held to show a bad mind.

Magistrates are not expected to know the law as certainly as judges would be expected to know it, and where, in spite of their appearing to have acted wrongfully, it is not shown that their motives were corrupt, courts will not assume that corruption on their part merely from the fact of their having made mistakes in the law.

In dealing with cases of this kind courts have always laid a good deal of weight on the magistrate's statement of the absence of improper motives. Where the case is otherwise not strong, and, particularly, where it is possible that the magistrate has made a *bona fide* mistake as to his powers, courts have held that no information shall be ordered to be exhibited, as the remedy sought is an

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extraordinary one, and the informants have the right to proceed by indictment in the ordinary way if they choose.

I am of opinion, therefore, that the rules should be discharged.

It has been argued that the magistrate should be ordered to pay the costs. As in my opinion the application fails, I do not think that he should.

On the other hand, as the magistrate acted beyond his powers, no costs should, in my opinion, be awarded him. Besides, it was in his power, when served with the notices prior to the issue of the rules, to appear personally or by counsel, upon the return of those notices, and to there raise all questions that by his counsel he afterwards did on the return of the rules *nisi*. He chose not to follow that course. If he had there given the explanation and denial of corrupt motives that he afterwards gave on the return of the rules, those rules would not, I think, have been granted.

PERDUE, J.A. A rule *nisi* was granted on 4th November, 1912, calling upon Alexander McMicken, a police magistrate of this Province, to show cause why a criminal information should not be exhibited against him. The charge contained in the rule *nisi* is that he unlawfully, maliciously, wickedly and corruptly, and contrary to his duty as said police magistrate, dealt with and disposed of a certain information laid by one Hugh MacKenzie against a person then unknown to the informant, charging such person with the crime of personation at an election of a member to serve in the House of Commons, at a time prior to that fixed for the hearing of the charge, and in the absence of and without the knowledge of the informant. A similar rule *nisi* was also granted against the same magistrate, making a similar charge in reference to the disposition by him of another information laid by one Richard H. McDonald, charging one Tom Morris with the crime of personation

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at the same election. A motion has been made in each case to make the rule absolute and the Magistrate has, by his counsel, appeared and shown cause, the two motions being argued together.

The facts, as they appear to me to be important, are as follows:

On 12th October, 1912, an election was being held in the Electoral District of Macdonald for the election of a member for that district to serve in the House of Commons of Canada. Hugh MacKenzie of Winnipeg, barrister-at-law, was the agent of one of the candidates at one of the polling divisions. A person whose name and identity were unknown to him attempted to personate one of the qualified electors on the list by applying for a ballot paper in the name of such qualified elector. MacKenzie thereupon swore out an information before the deputy returning officer, charging the party in question with the offence of personation, and a warrant was issued under which the alleged personator was arrested and lodged in the jail at the police station at St. James.

At another polling division a similar charge was laid by McDonald against another alleged personator, who gave his name as Tom Morris, and he also was arrested and lodged in the same jail. Both of the accused persons were on the same day released on bail by S. D. Richardson, a justice of the peace. The recognizances of bail accepted by Mr. Richardson, and on which the accused were released, were produced, attached to the informations. These show that no time or place was specified at which the accused were to appear and the offence with which they were charged was not mentioned. The recognizances appear to have been hurriedly and negligently prepared. One is headed, *Re* "George Stout." The quotation marks appear in the original and apparently indicate doubt

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whether the name was real or assumed. In this recognizance it is declared that Fred Adams and John Nolan, both of Winnipeg, were bound in the sum of $250 each, said sums to be levied to the use of the King "if he, the said *Tom Morris* fails in the condition hereunder written (or indorsed hereon)." The other recognizance is headed *Re* "Tom Morris," again using quotation-marks, and the same sureties bind themselves in similar sums to be levied "if he the said *George Stout* fails," etc. The pretended recognizance taken in the Stout case was for the due appearance of Morris, and that in the Morris case was for the due appearance of Stout.

No condition was underwritten on either of the recognizances. In each case there is a form printed on the back of the recognizance and intended to be filled up, to show the offence charged, the day to which the case was adjourned and when and where the accused is to appear, in default of which appearance the recognizance is to be enforceable against the sureties. This form was left completely blank, nothing whatever being written into it. There was, therefore, no time or place specified at which either of the accused persons was to appear, and there was no condition in either recognizance for the breach of which the sureties could be held liable. For all purposes the pretended recognizances might have been mere blank paper.

On Monday, 14th October, McDonald was informed by James Bain, Chief of Police for the Municipality of Assiniboia, and keeper of the jail at St. James, that Morris had been admitted to bail and had been remanded to be tried on 16th October at 11 o'clock in the forenoon, and he was on the 15th October again told by Bain that the Morris case would come up for trial before Police Magistrate McMicken at the Police Court, Winnipeg, on the following day at 11 A.M. On 15th October, Bain informed MacKenzie and his counsel, Mr. Trueman, that

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Stout had been remanded for trial before Alexander McMicken, Police Magistrate, at the Provincial Police Court at Winnipeg on 16th October at 11 o'clock in the forenoon. On the 15th October, MacKenzie and his counsel were informed by the Clerk of the said police court that the case against Stout was coming before that police court on the 16th October at the hour above mentioned. At the request of MacKenzie and his counsel subpœnas were issued for witnesses who were required to give evidence on the charge, and these subpœnas were prepared by said clerk commanding the attendance of witnesses at the said court on 16th October at 11 o'clock in the forenoon.

On the morning of 16th October, MacKenzie and McDonald appeared at the said Police Court about fifteen minutes before 11 o'clock and were then informed that the magistrate, Alexander McMicken, had already disposed of the cases. The accused persons had appeared before Mr. McMicken in his private room shortly after ten o'clock and had pleaded guilty to the charge in each case. The magistrate had then imposed a fine of fifty dollars upon each offender, this being the lowest penalty permitted by the statute. At or soon after 11 o'clock, Mr. Trueman, counsel for the prosecutors, stated to the magistrate, who was then on the bench, that he appeared on behalf of the informants, and was ready to proceed with the charges. The magistrate told him that he had already tried the cases. A conversation then took place between Mr. Trueman and the magistrate and between the latter and MacKenzie, which is set out in full in the affidavits made by MacKenzie, McDonald and Fairlie, a newspaper reporter who was present. The magistrate has filed an affidavit in which he denies two of the statements attributed to him, but states that it was impossible for him "to remember *verbatim* what took place on the occasion in question." He admitted that he was very

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angry at the time. The clerk of the court and other persons appear to have been present during the conversation, but no affidavit has been produced from any of these persons to corroborate the magistrate's statement as to what took place. The weight of evidence, therefore, is that the magistrate made the statements attributed to him in the affidavits of MacKenzie, McDonald and Fairlie.

It is clear that the magistrate refused to furnish to the prosecutors or their counsel information as to the amount of the fines he had imposed on the offenders, or to give the reason why he had disposed of the cases before the time fixed for the trial, and in the absence of the prosecutors. When MacKenzie, one of the prosecutors, persisted in asking why his case had been heard in his absence and before the time fixed for trial, the magistrate ordered him to "shut up" and threatened him with arrest. The account given in the affidavits filed by the applicants shows that the magistrate used unseemly language during the above conversation, and acted improperly in withholding information to which the prosecutors were entitled. The conversation took place so soon after he had dealt with the charges that it may be regarded as part of the same transaction, for the purpose of showing the magistrate's state of mind and of enabling us to form an opinion as to whether he was influenced in his judicial determination of the cases by any improper motive, such as prejudice against the prosecution or a desire to favour the accused.

The charge against the magistrate is that he acted "unlawfully, maliciously, wickedly and corruptly and contrary to his duty as said police magistrate," in hearing and disposing of the aforesaid informations and charges at a time prior to the time fixed for hearing and at a time unknown to the informants and in the absence, and without the knowledge, of the informants. The question

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raised upon this application is, "not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, under which description fear and favour may generally be included, or from mistake or error;" per Abbott, C.J., in *Rex* v. *Borron,* 3 B. & Ald. 432, 434; see also *Reg.* v. *Badger,* 4 Q.B. 468, and *Re Fentiman,* 4 Nev. & M. 126. A criminal information has been granted where a magistrate has been shown to have acted from political prejudice or resentment: *Rex* v. *Williams,* 3 Burr. 1317; *Rex* v. *Hann,* 3 Burr. 1716. It is the duty of the magistrate to act fairly between the parties, and if he showed partiality, in the sense of giving an unfair advantage to one litigant party over another, he would be guilty of a breach of duty: *Reg.* v. *Badger,* 4 Q.B. 473. But whenever it appears that the magistrate acted honestly and uprightly, even though he mistook the law, no information will be granted against him.

The excuse that the magistrate offers for his action is that, on the morning of 16th October, a telephone communication was sent to him by Mr. Sullivan, a lawyer, who appears to have been acting for the accused parties, requesting the magistrate to attend at his court room at about nine o'clock, as he, Sullivan, had some important cases he wished to get disposed of. The magistrate arrived at the Police Court at about twenty minutes after nine o'clock. He then received the papers relating to the cases from Bain, the Chief of Police. The accused persons soon after appeared, accompanied by Mr. Sullivan, and the magistrate then disposed of both cases in the absence of, and without notice to, the prosecutors. The entry of conviction in each case purports to have been made at 10.30 o'clock.

The only explanation offered by the magistrate for proceeding in this hasty and unusual manner was that Mr.

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Sullivan said he had another appointment and was anxious to have the cases disposed of as speedily as possible. The magistrate states that he had no knowledge of the cases until the papers were handed to him on the morning of the 16th October, and that he did not know that the hearing had been fixed for eleven o'clock on that morning. He further states that he "had no reason to suspect or believe that either the said Richard H. McDonald or the said Hugh MacKenzie had any personal desire, or were in any way interested in being present when the convictions were made, inasmuch as both the accused were pleading guilty."

The magistrate had no reason to believe that the prosecutors were aware that the accused would plead guilty. He knew that both the accused persons were charged with the offence of personation at a Dominion Election held a few days previously. The informations showed that the charge in each case was laid by a private prosecutor before the deputy returning officer at a polling division, so that the inference was plain that the accused had been detected in the very act of committing the offences and had been then and there apprehended. It should have occurred to the magistrate that the parties in charge of the prosecution might desire to show that the accused should be dealt with severely as having deliberately planned and knowingly committed the offences. The private prosecutor in each case had a right to be present and take the conduct of the prosecution he had instituted, and the magistrate had no right to proceed in his absence: *Stephen, Hist. of Crim. Law,* Vol. I., pp. 494-495. The private prosecutor had a right to be present in order to identify the accused and to rebut, if he could, any evidence offered in extenuation of the offence. The minimum penalty was imposed in each case, the reason given by the magistrate being that the accused stated that they were under the influence of liquor at the time.

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The applicants very justly contend that they were entitled to contradict and disprove this allegation, and to ask for the imposition of a greater punishment.

The magistrate could have ascertained from the clerk of his own court the hour for which the trials were fixed. He should have ascertained this and he had no right, without the consent of the prosecutors, to deal with the cases before the proper time had arrived. The offences were of a serious nature. They should have been disposed of in open court and not secretly in the magistrate's private room.

While I am impressed with the view that the magistrate acted improperly, there is still the all important element to be considered, did he so act from a dishonest or corrupt motive such as favouring or shielding the accused? If he had discharged the accused without inflicting any punishment, I would have had no hesitation in deciding that the application for a criminal information should be granted. But he did impose a penalty and, although it was the lowest he could impose under the statute, that was a matter left to his discretion. I am not satisfied that it has been sufficiently shown that he so favoured the accused, or was so prejudiced against the prosecutors, that there was not, in fact, an exercise of judicial discretion upon his part, and that he had a fixed intention to treat the offenders as leniently as the law would permit. His improper conduct in disposing of the cases before the time fixed for hearing them, and in the absence, and without the knowledge of the prosecutors, may have arisen from a want of knowledge of the legal procedure to be observed, or from a mistaken idea of his powers. Again, the magistrate may have acted honestly and may unwittingly have allowed himself to be used as an instrument in the hands of persons who were aiding, abetting and protecting the offenders.

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It is incumbent upon the applicants to show that the magistrate acted from a dishonest or corrupt motive. As Lord Denman pointed out in *Re Fentiman*, there must be sufficient proof of corruption to warrant the Court in granting a rule for a criminal information against a magistrate, though there may be much that is reprehensible and suspicious in his conduct. I am not satisfied that the applicants have clearly established a case for the granting of a criminal information against the magistrate, and I think the Court should, in the exercise of its discretion, refuse the application.

The rule in each case should be discharged, but without costs.

CAMERON, J.A. Magistrates, like other subjects, are answerable to the law for the faithful and upright discharge of their trust and duties. When their conduct is impugned the question is, from what motive has the act done proceeded, "whether from a dishonest, oppressive or corrupt motive, under which description fear and favor may generally be included, or from mistake or error"? *Rex* v. *Borron*, 3 B. & Ald. 434. That the motive does not spring from interest is not material, "for, if they (the magistrates) acted from passion or opposition, that is equally corrupt as if they acted from pecuniary considerations": *Rex* v. *Brooke*, 2 T.R. 196.

"Every public officer commits a misdemeanour who, in the exercise of the duties of his office, does any illegal act, or abuses any discretionary power with which he is invested by law from an improper motive, the existence of which motive may be inferred either from the nature of the act or from the circumstances of the case. But an illegal exercise of authority caused by mistake as to the law, made in good faith, is not a misdemeanour within this article": Note, Canadian Criminal Cases, XI, 344, and cases there given.

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Lord Mansfield said in *Rex* v. *Cozens*, 2 Doug. 427: "No justice of the peace ought to suffer for ignorance where his heart is right. On the other hand, when magistrates act from undue, corrupt or indirect motives, they are always punished by this Court."

That is to say, if the magistrate makes a mistake honestly from misapprehension of the law, he is answerable to no one. But if he acts in the execution of his duties from any indirect or improper motive, any motive that has not in view the due administration of justice, then he is punishable by the Court.

There are two cases before us, practically identical in circumstances with each other, in which the conduct of a Provincial police magistrate is called in question. I deal first with that in which the information was laid by Mr. MacKenzie, agent for one of the candidates at Poll No. 2 in the electoral district of Macdonald at the election there held on October 12th last.

On Saturday, October 12, 1912, at polling booth No. 2 in the said electoral district, at an election held on that day in that district, there appeared before Harry V. Vincent, the deputy returning officer at said booth, a person who applied to the returning officer in the name of Allan W. Craigie for a ballot, giving the name of Allan W. Craigie and his residence and occupation. Mr. MacKenzie thereupon asked the deputy returning officer to place this person in custody of the poll constable, drew up and swore to an information for personation, upon which the deputy returning officer issued his warrant and placed it in the hands of provincial constable James Bain, who took the said person into custody.

Now, it is not here contended that it was by an accident that this person happened to know the name of an absentee voter, stumbled fortuitously into the polling booth of the polling division where this absentee voter was entitled to vote and, without knowing what he was doing,

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asked for a ballot paper, giving the name of the absentee voter. The natural inference is that the person so attempting to personate an absentee voter was doing what he did at the instigation of some interested parties who furnished him with the information and directed his movements. It was a matter of design, not of accident.

Afterwards on the same day a justice of the peace, named S. D. Richardson, released the person so taken into custody. We find amongst the papers returned by the magistrate, A. McMicken, Esq., with his affidavit, and attached to Mr. MacKenzie's information, a form of recognizance of bail, headed "Re Tom Morris" but containing the name of "George Stout," signed by said Richardson. Inasmuch, however, as the condition of the recognizance is in blank, the recognizance is worthless, and the parties mentioned therein, Fred Adams and John Nolan, were bound to nothing.

So that here we have the accused person referred to as an "unknown person," afterwards identified as Woods in MacKenzie's affidavit, and referred to as "Tom Morris" and as "George Stout" in the alleged recognizance of bail, released upon the bail of no one, not even of himself. All this without notice to the prosecutor.

These papers were produced for the first time on this motion. So that no question has been raised whether the party guilty of personation was designedly or inadvertently released by magistrate Richardson without bail and without notice to the prosecutor.

Mr. MacKenzie went with his counsel, Mr. W. H. Trueman, on Tuesday, October 15th, to St James, and there saw police constable Bain, who told them that magistrate Richardson had, on the evening of October 12th, ordered the release of the accused and remanded him for trial before A. McMicken, Esq., Provincial

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magistrate, at the Provincial Police Court in the City of Winnipeg on Wednesday, October 16th, at 11 o'clock in the forenoon.

It is not shown why magistrate Richardson remanded the case to another magistrate in the absence of the prosecutor. He does not come forward to tell us that he did this of his own motion, nor does he say that he did it at a suggestion from outside. It would not, however, be difficult to draw the inference that he did not act in so extraordinary a manner spontaneously.

Mr. MacKenzie, with Mr. Trueman, went to the Provincial Police office on October 15th at 3 o'clock, and they were there told by the Clerk of the Court that the case against the accused would be on at 11 o'clock in the forenoon of the next day. Subpœnas for three witnesses were then prepared, commanding their attendance at 11 o'clock on Wednesday, October 16th.

Mr. MacKenzie attended at the Police Court at 15 minutes to 11 o'clock that day but was informed that the case had been already disposed of. The clerk of the court informed Mr. MacKenzie and Mr. Trueman of this also and showed the written information upon which was endorsed:

'Wpg., October 16th, 1912.

"10.30 a.m.

"Pleads guilty with extenuating circumstances.

"Fined $50. Pd."

According to Mr. MacKenzie, whose affidavit is corroborated by Mr. Fairlie, there then ensued the various questions and answers and statements between Mr. MacKenzie, Mr. Trueman and the magistrate, set out in paragraph 14 of his affidavit, in which he says positively that the magistrate declared that Mr. Sullivan, barrister, had appeared for the prosecution when the case was disposed of.

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In Mr. Fairlie's affidavit it is further stated that, when the clerk of the court was about to show some paper to Mr. Trueman, the magistrate said to him: "Why you are giving things away. God Almighty, don't show anything to them."

We are not here and now asked to believe that any of the circumstances antecedent to the trial before magistrate McMicken, viz., the asking by the accused for a ballot paper, the secret release of the accused without bail, or the secret remanding of the case to be heard before Magistrate McMicken, was an occurrence wholly accidental in its nature. But we are asked to take it as the truth that the extraordinary action of the magistrate was purely accidental, that it was due to the singular fact that Mr. Sullivan, counsel for the accused, had an engagement at the Court House and, therefore, wanted the case disposed of as speedily as posssible. The whole defence comes down to this, that it was owing to Mr. Sullivan's appointment at the Court House that the magistrate took the arbitary and improper course he did in dealing with the information (which charged the accused with a most serious offence) summarily, secretly, in the absence of the prosecutor and before the time fixed for the trial.

It is to be noted that we have not been furnished with affidavits from magistrate Richardson, from police constable Bain, from the clerk of the court or from Mr. Sullivan. All these parties should be produced for examination before this matter can be finally cleared up. At whose request did magistrate Richardson release the accused without notice to the prosecutor, and remand the case for trial before magistrate McMicken? How did the police constable acquire his information as to the date of the remand and other matters, and what information did he actually afford to the sympathetic ear of the magistrate on the subject of "extenuating circumstances"? On what facts in his knowledge was it that the clerk of

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the court informed the prosecutor of the hour fixed for the trial and issued subpœnas returnable at that time? By what reasoning did counsel for the accused persuade the magistrate to dispose of these cases without embarrassing publicity? These and other pertinent questions might have been answered, but they are not.

I must say that I am impressed with the unreality of the names of "George Stout" and "Tom Morris." So inextricably are they confused in the alleged recognizances of bail that there is ground for the suspicion that they may be both fanciful designations for one and the same man.

The law provides that the magistrate's court shall be an open court. See section 714 of the Code, with reference to trials before a justice in case of summary convictions, and section 787, in the case of summary trials for indictable offences. "Every court held by a magistrate for the purpose of this Part shall be an open public court." This was the law before the Code and for obvious reasons.

Criminal matters must be disposed of in the presence of the public and the prosecutor. And, even if the accused pleads guilty, the prosecutor has a right to be present to adduce evidence bearing upon the question of the severity of the penalty to be inflicted.

Section 272 of the Dominion Election Act provides that:

"Every person is guilty of personation and liable to a penalty not exceeding two hundred dollars and not less than fifty dollars, and to imprisonment for a term not exceeding two years and not less than three months, who, at an election:

"(*a*) applies for a ballot paper in the name of some other person, whether such name is that of a person living or dead, or of a fictitious person."

The variable nature of the punishment that can be inflicted indicates that the magistrate has a discretion to

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be exercised on the evidence before him. Obviously, if the accused offers evidence, the prosecutor must be at liberty to controvert it if he can and wishes to do so.

The powers of a private prosecutor are as great as those of the Attorney General. "No person has any legal power for the collection of evidence, or for its production before the magistrate, or in appearing before the court by which the matter is finally determined, in the one case, which the person placed in a corresponding position has not in the other": *Stephens, Hist. Criminal Law,* I, 495.

That the prosecution has the right to produce evidence in aggravation appears absolutely clear: *Rex* v. *Bunts,* 2 T.R. 683; *Rex* v. *Dignam,* 7 A. & E. 593.

It was argued in reply that the proceedings of the magistrate were at most irregular only; that there was no legal evidence of the adjournment until 11 o'clock and that the applicant had failed to make the strong *prima facie* case, based on direct evidence, required by the authorities: *Reg.* v. *Stanger,* L.R. 6 Q.B. 352; *Rex* v. *Willett,* 6 T.R. 294. It was contended that there was here no corrupt motive shown and there could not have been such because the magistrate could have waited until 11 o'clock and inflicted the same penalty, and it cannot be said that the magistrate acted either illegally or corruptly. Counsel for the magistrate referred to *Ex parte Fentiman,* 2 A. & E. 127, amongst other cases.

In the other case, in which Mr. R. H. McDonald laid the information, a similar state of facts is shown. Mr. McDonald, acting as agent at the Poll No. 4 in said district at the said election, caused the arrest of one Thomas Morris for applying for a ballot paper in the name of Valentine G. Quinn, under a warrant issued by the deputy returning officer. Mr. McDonald saw Police Constable Bain on Monday, who then informed him that the accused had been released on bail. Here the recognizance is headed "Re George Stout" while in the body of it appears the name of "Tom Morris," and there is

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no condition endorsed. On Tuesday evening Mr. McDonald was informed by Bain that the case would come up before Police Magistrate McMicken at the Provincial Police Court, Winnipeg, on October 16, at 11 o'clock, before which time he was in attendance at that place. The rest of the affidavit of McDonald deposes to substantially the same facts as those set forth in the affidavit of Mr. MacKenzie.

The two cases must obviously be dealt with together. The following points appear to me of importance.

1. The magistrate says that one case was disposed of by him shortly after 10 o'clock in the forenoon—the other about 20 minutes past 10. In this he is contradicted by his own memoranda on the papers, which show that both cases were heard at 10.30 a.m.

2. It appears that the magistrate altered Mr. MacKenzie's sworn information in the absence and without the consent of the informant. Of this there is no explanation.

3. The statement, positively made by Mr. Fairlie and Mr. McDonald, that the magistrate said to the clerk: "Why you are giving things away. God Almighty, don't show anything to them," is denied by him, though he admits he did say that the clerk had no right to give information without consulting him. The weight of evidence on this point is against the magistrate, who admits in his affidavit that it was impossible for him to remember *verbatim* what took place.

4. The magistrate denies that he said Mr. Sullivan appeared for the prosecution, but that the other deponents misunderstood him. But that he did say that Mr. Sullivan appeared for the prosecution is positively sworn to by Mr. MacKenzie, Mr. Fairlie and Mr. McDonald. Here again the weight of evidence is against the magistrate.

5. The other statements ascribed to him in the affidavits are practically admitted by him.

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6. The magistrate arbitrarily and improperly refused to let the prosecutor have a copy of the information and record. The reason he gives for this refusal was no reason at all. His real motive is left to inference.

7. In answer to the charge that he failed to impose imprisonment as well as a fine, the magistrate says, in his affidavit, "I am not aware and I deny that it was my duty to sentence the said accused to a term of imprisonment," which may be true, but is irrelevant and disingenuous, as he should have sworn to his knowledge as of the date when he imposed the fine, and not as of the date when he made his affidavit.

8. We have not before us affidavits from Constable Bain, Magistrate Richardson, the Clerk of the Police Court, or Mr. Sullivan, all of whom could shed much light on the questions here raised. The absence of these affidavits affords ground for legitimate comment.

9. The fact that there were two cases, not apparently related to each other, disposed of by the magistrate in precisely the same way, practically simultaneously, gives rise to serious considerations. That the magistrate should secretly dispose of one is hard enough to explain and defend, but that he should thus hurriedly get rid of two cases is a difficult matter indeed to apologize for. It is singular that it should have occurred to each of these two offenders to plead the astonishing plea of drunkenness, and that such a futile matter of alleged excuse should have been entertained without question. It is likewise singular that each of these two self-confessed criminals should have had with him the sum of fifty dollars, being the exact amount of the fine to be inflicted.

10. In his memorandum in the Morris case the magistrate says that the excuse of inebriety there pleaded before him was substantiated by the police authorities; but this he does not repeat in his affidavit. Mr. MacKenzie swears that the magistrate said in the court room that

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Constable Bain had told him that the accused was drunk, and that he (McKenzie) told the Magistrate, "But Constable Bain told me that he was sober and gave no evidence of having been drinking," and that Constable Bain, who was present, said he had made no statement whatever with reference to the accused having been drinking. It is to be observed that we are here without the evidence of Constable Bain. The evidence is against the magistrate on this point.

11. The conduct and language of the magistrate, as set forth in the affidavits, were so violent and tyrannical as to lend some color to the view that his action in these two matters was dictated by improper motives. Certainly to contend such action was prompted with a view to the due and proper administration of justice seems to me inconsistent with his treatment of the men who were attempting to bring violators of the law to justice.

In addition to the foregoing considerations and conclusions, I think it clear that the real charge against the magistrate, that of disposing of these cases secretly and in the absence of the prosecutor, is not met by him with any explanation whatever, except the fatuous one of Mr. Sullivan's appointment at the Court House on the morning in question, to which I have alluded.

After a careful perusal and consideration of the material filed, I have come to the conclusion that, in the result, the proceedings before the magistrate were a travesty on the administration of justice, and that there has been made out a *prima facie* case of connivance on his part, by acquiescence and otherwise, and with knowledge of the material facts involved. Upon the material, it is not going far afield to draw the inference that it was the intention of the magistrate to deal with these cases with a minimum of publicity and with as little damage as could possibly accrue to the self-confessed criminals and their accessories. The evidence before us

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is such that a grand jury might readily find a true bill upon it. Not until the various parties who have made affidavits and others I have mentioned have been examined in open court can the issues here raised be finally and satisfactorily determined. The questions involved, viz.: that of the sanctity of the ballot and that of the integrity of the magistracy, are of the highest importance and it is in the public interest that the matters in issue should be authoritatively dealt with by a jury.

In my opinion the evidence before us points to a conclusion that the magistrate in the extraordinary and arbitrary course he adopted in these two cases was animated by an indirect and improper motive; that is to say, by a motive having in view something other than the due and impartial administration of justice. This conclusion, however, may be rebutted and overthrown by further evidence. Therefore there seems good reason why the magistrate himself, whose conduct has been so sharply and so publicly assailed, should, if fully conscious of his own uprightness, have no hesitation in submitting to the test of a trial before a jury of his fellow countrymen.

In my opinion the rules in these cases should be made absolute.

HAGGART, J.A. I have read the reasons of my brother Richards, and I agree with him that the rule should be discharged.

I thought on the original motion that the rule *nisi* should have been refused. Subsequent argument on the motion to make the rule absolute confirmed me in my first opinion.

In a serious proceeding like this stronger evidence than was offered should have been submitted.

One of the grounds of illegality urged on the *ex parte* motion for the rule *nisi* was that under the statute the magistrate was bound to impose imprisonment in addition

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to the fine. Judicial interpretation, however, supports the decision of the magistrate and on the argument this ground was abandoned by counsel for the informant.

In my opinion there was no evidence of any corrupt or improper motive, nor was there any illegality in the proper sense of the term, unless a mistaken view of an official's duty is an illegal act.

It is true the magistrate lost his temper in the altercation set out in the informant's affidavit; but I cannot say there was no provocation. This altercation, however, took place subsequent to the disposition of the cases in question.

The rule should be discharged.

Rules discharged.

CHARETTE-KIRK CO. v. MCKITTRICK.

Before CURRAN, J.

Building contract—Completion—Fire—Payment in instalments.

Under a contract for specified work and materials to be done and provided on a building for a specified sum payable 80 per cent every two weeks as the work progresses, the balance in 20 days after the work is completed, the contractor can recover 80 per cent of the value of the work done and materials provided up to the end of each fortnightly period; but, if the building is destroyed by fire without the default or negligence of the owner before the end of another period of two weeks, and before completion of the contract, the contractor can recover nothing further under the contract, or as upon a *quantum meruit*.

Appleby v. *Myers*, (1867) L.R. 2 C.P. 660, and *Sherlock* v. *Powell*, (1899) 26 A.R. 407, followed.

Collins Bay v. *New York & Ottawa Ry. Co.*, (1902) 32 S.C.R. 216, distinguished.

DECIDED: 13th December, 1912.

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Statement.

THE plaintiff Company sued to recover from the defendant the sum of $608 as the balance due upon a contract in writing with the defendant to perform certain work and supply certain materials in connection with the sheet metal work and roofing on a certain building in the City of Winnipeg, and in the alternative the same amount for work done and materials provided by the plaintiff for the defendant at his request and for goods sold and delivered by the plaintiff to the defendant. The defendant denied all liability.

H. P. Blackwood and *A. Bernier* for plaintiffs cited *Chandler* v. *Webster,* [1904] 1 K.B. 493; *Menetone* v. *Athawes,* 3 Burr. 1592; *Tripp* v. *Armitage,* 4 M. & W. 699; *Collins* v. *New York,* 32 S.C.R. 216; *Lord* v. *Wheeler,* 67 Mass. 282; *Elford* v. *Thompson,* 1 D.L.R. 13; *Taylor* v. *Laird,* 1 H. & N. 266; *Stubbs* v. *Holywell,* L.R. 2 Ex. 311, and *Simpson* v. *Crippin,* L.R. 8 Q.B. 14.

A. E. Hoskin, K.C., and *W. C. Hamilton* for defendant cited *King* v. *Low,* 3 O.L.R. 234; *Sherlock* v. *Powell,* 26 A.R. 407, and *Laing* v. *Barclay,* 77 L.J.P.C. 33.

CURRAN, J. The contract is contained in two letters (Exhibits 1 and 2). The first is in the words and figures following:

"St. Boniface, May 8-12.

"Mr. M. T. McKittrick,
Winnipeg.

"Dear Sir:

We agree to supply and put up the sheet metal work and gravel roofing as per plans and specifications as follows: The main and lower cornice as per details supplied by us and as per understanding we had together. Gravel roof five plies felt, flashing around gables, three hoppers with wire guard for gravel, one fire proof door, metal ceiling for boiler room. We will do all the work above mentioned for the sum of Nine hundred and ninety two dollars ($992.00) payable

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as follows: Eighty per cent (80%) every two weeks as the work progresses, the balance payable twenty days after the work is completed.

Hoping this to be satisfactory to you,

Yours truly,

The Charette-Kirk Co., Ltd.,

per J. A. Charette."

The acceptance of this tender (Exhibit 2) is as follows:

"551 Beresford Avenue, Winnipeg,

May 9, 1912.

The Charette-Kirk Co.,

St. Boniface.

Dear Sirs:

I hereby agree to accept your tender for metal cornice, roofing and flashing, hoppers, fire proof door and metal ceiling for boiler room; all work to be done according to plans and specifications and details supplied by you and accepted by me.

Yours truly,

M. T. McKittrick."

The plaintiff began work on May 15th, 1912. All of the work contracted for was done excepting the fire proof door and some 625 feet of metal ceiling in the boiler room, admitted by both parties to be worth only $68, and to this extent only was the contract unperformed on the night of June 24th, 1912, when a fire occurred, which totally destroyed the building, and incidentally the plaintiff's work.

It is admitted that such work as had been actually done was properly done and in accordance with the contract.

On June 12, 1912, the plaintiff Company rendered the defendant a statement of material and labor to date (Exhibit 4), at $400, deducted 20 per cent. as provided by Exhibit 1, and was paid by the defendant the remaining 80 per cent., namely $320. This is the only payment made.

The building in question was a three story brick building and the work the plaintiff Company was to do

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formed only a small part of the work of constructing the entire fabric.

There was some conflict between the parties as to what specifications governed the performance of the contract; whether long and formal specifications put in at the trial (Exhibit 3), or merely what was contained in Exhibit 1. In the view I take of the case, it is not material which contention is correct.

It is to be noted that the plaintiff by its statement of claim charges that the fire which destroyed the work was caused by the defendant's negligence. This is specifically denied by the statement of defence. No evidence of negligence was given at the trial and I understood the plaintiff's counsel to abandon the charge altogether. So that, for the purposes of this case, the fire may be treated as wholly accidental in its origin and not in any way attributable to the acts or negligence of either party.

The question then to be decided is wholly one of law. What liability, if any, against the defendant exists under the contract in view of the work not having been wholly completed by the plaintiff, owing to the destruction of the building by fire from causes not attributable to either party to the action.

Admittedly considerable work had been done and materials supplied, which had not been paid for at the time the fire occurred. Who then should bear this loss? The plaintiff contends that the contract is not one to pay on completion only, that it is not entire and the 80 per cent. of the contract price is legally payable as the work progresses. The defendant, on the other hand, contends that the contract is entire and the fact that the contract price is payable by instalments does not destroy its entirety. He refers to *King* v. *Low*, 3 O.L.R. 234; *Sherlock* v. *Powell*, 26 A.R. 407; *Appelby* v. *Myers*, L.R. 2 C.P. 651. The principle of law affirmed in these

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cases was that, where there is a contract to do work for a specific sum payable on completion, there can be no recovery until the work is completed, and the plaintiff cannot recover for the portion done upon a *quantum meruit.*

The facts in the case of *Sherlock* v. *Powell,* above referred to, are almost identical with this case, except in this, that due completion of the work was alleged by the plaintiff but denied by the defendant. The finding of the court, however, was against the plaintiff upon that point, and he was therefore held not to be entitled to recover the balance due as upon the contract, nor could he recover upon a *quantum meruit.* It is to be noted that in this case (*Sherlock* v. *Powell*) payments before action practically equal to the 80 per cent., as provided for in the contract, had been made, so that the dispute was entirely over the balance which could only be referable to the work not completed.

The plaintiff cites numerous cases in support of his contention that the contract is divisible. I need only refer to one which is binding upon me—*Collins Bay Rafting Co.* v. *New York and Ottawa Ry.,* 32 S.C.R. 216, where the contract was in effect to remove spans from a wrecked bridge in the St. Lawrence River. The contractor agreed "to remove both spans of the wrecked bridge and put them ashore for the sum of $25,000. We to be paid $5,000 as soon as one span is removed from channel and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed." The Court held that the contract was divisible and the contractor having removed one span from the channel and put it ashore was entitled to the two payments of $5,000 each, notwithstanding the whole work was not completed within the time agreed upon.

The principle underlying that case is, I think, similar

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to that involved here, namely, that, on certain contingencies happening, a present right to receive part of the contract price arose, and could not be divested by a subsequent default with respect to the remainder of the work. This decision in no way conflicts with the cases cited by the defendant's counsel and, applying it here, I find that the plaintiff was entitled to be paid his 80 per cent. of the value of the work and labor done at the expiration of each period of two weeks computed from the 15th of May, 1912, up to the last period preceding the fire. On this basis the plaintiff became entitled to his first estimate on May 29th, the second on June 12th, and no further estimates thereafter. The plaintiff, as before stated, rendered a statement for the first two estimates at $400; being for labor and material to June 12th, deducted the 20 per cent. according to Exhibit 1; and was paid $320 by the defendant. This payment fully satisfied all moneys payable under the contract at that date, namely June 12th, 1912. The next estimate or periodical payment could not become due, according to the contract, until the 26th day of June, 1912, and unfortunately for the plaintiff the fire occurred on the 24th of June, just two days before an estimate for a further 80 per cent could be demanded under the contract.

Applying the principle of law affirmed in the cases I have been referred to, and which in no way conflict with the judgment of the Supreme Court in *Collins* v. *New York,* I must hold that the plaintiff cannot recover for the value of the work done and material supplied since the date of his last estimate on June 12th, either upon the special contract, or upon a *quantum meruit,* as there is no evidence to show a new agreement to pay for the work already done. There is nothing in the contract between the parties to take the case out of the principle of law as stated by Blackburn, J., in *Appleby* v. *Myers,* L.R. 2 C.P. 660: "We think that, on the principle of English

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law laid down in *Cutter* v. *Powell*, 6 T.R. 320, and other cases, the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete or that there is something to justify the conclusion that the parties have entered into a fresh contract."

This principle would of course be controlled in the present case by the express stipulations in the contract as to payments and would not disentitle the plaintiff to recover from time to time his periodical estimates as they became due; but it seems to me that it does apply to the plaintiff's claim in this action and prevents his recovery.

There is no suggestion in the evidence, nor is it contended by the plaintiff, that the defendant was responsible for the non-performance of the plaintiff's contract.

I hold, therefore, that the plaintiff cannot recover, and dismiss the action with costs.

IN THE COURT OF APPEAL.

NAVARRO v. RADFORD-WRIGHT CO.

Before HOWELL, C.J.M.; RICHARDS, PERDUE, CAMERON and HAGGART, JJ.A.

Jury trial—Application for order for a jury—Negligence—Accident—Question of damages—Sufficiency of material to show seriousness of injury.

On appeal from the Referee, a Judge refused an order for trial of the action by a jury. He thought it was a case which might well be tried by a jury, but he thought the material before him insufficient to show that the injury sustained by the plaintiff was of a serious character, and suggested that an affidavit of the physician who had attended the plaintiff should be obtained.

That material consisted of an affidavit of the plaintiff stating that he had received a wound in the head by which his skull was fractured; that he had been knocked insensible and remained unconscious until he found himself in the hospital; that he remained there for 20 days,

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and that a semi-paralysis was affecting one side; and an affidavit of his solicitor setting forth what the doctor who had attended the plaintiff had said about the case. 1912

The plaintiff was fully cross-examined on his affidavit, and made out a case of considerable and, in the opinion of the Court, serious injury.

Held, on appeal to this Court, that the Judge should have been satisfied with the material in this case, and that there should be an order for trial by jury.

DECIDED, 6th December, 1912.

APPEAL from an order made by Metcalfe, J., refusing to grant an order for trial of the cause by a jury. Statement.

E. A. Cohen for plaintiff, appellant, cited *Hewitt* v. *Hudson's Bay Company*, 20 M.R. 126, 320; and *Griffiths* v. *Wpg. Electric Ry. Co.*, 16 M.R. 512.

L. J. Elliott for defendants, respondents, cited *McCormick* v. *C.P.R.*, 12 W.L.R. 363.

The judgment of the Court was delivered by

HOWELL, C.J.M. An application was made in this matter before the Referee for an order to have the cause tried by a jury. The Referee refused the motion and, by appeal, it was brought before Mr. Justice Metcalfe, who also refused to grant the order.

The learned Judge did not give a written judgment, but, there being some difference between counsel as to the reason why the Judge refused the order, I consulted him with reference to it. The learned Judge informed me that he thought it was a case which might well be tried by a jury if the plaintiff had satisfied him that the injury which he sustained was of a serious character.

It appears that the plaintiff was injured by something falling from the defendants' building, whereby his head was injured. The material in favor of the motion consists of an affidavit of the plaintiff upon which he had been fully cross-examined, and an affidavit of the plaintiff's solicitor. In his affidavit the plaintiff stated that the injury to him consisted of a wound in the head by which the skull was fractured; that he was knocked insensible

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and remained unconscious until he found himself in the hospital; that he remained in the hospital for some 20 days and that a semi-paralysis was affecting his arm and leg.

He was cross-examined fully upon this affidavit and, although he was a foreigner and had to speak through an interpreter, he made out a case of considerable and, to my mind, serious injury.

The solicitor's affidavit was simply a statement of what the doctor who attended the plaintiff told about the case. The Judge suggested to the solicitor on the argument that he get an affidavit from the doctor but, as the plaintiff's solicitor did not wish to submit that doctor to a cross-examination on the affidavit, he did not do so.

With great deference to the learned Judge, I think a fair and reasonable case of serious injury was made out by the affidavit and by the examination. His confinement in the hospital was a matter which the defendants could have verified very easily.

I agree with the learned Judge that this is a case which might well be brought before a jury. This is not a case of reversing the order of a Judge where he has exercised a discretion in a matter of this kind, for apparently he thought it a case where it would be expedient to have trial by jury. The only reason for his refusing the order was that he was not satisfied that the plaintiff had set forth such facts that, if he succeeded, the damages would be substantial. I think the learned Judge should have been satisfied with the material before him in this case.

I would not wish to hold that in all cases the affidavit of the plaintiff and his solicitor are quite sufficient to obtain an order in matters of this kind. It may well be that a Judge should require further material in many cases, but I think in this case the plaintiff's affidavits are

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sufficient on the question of the substantiality of the injury.

I think the orders of the learned Judge and of the Referee should be set aside and an order should issue for the trial of this cause by a jury.

The appeal is allowed with costs to be costs in the cause to the plaintiff in any event of the cause. The costs of the motions before the Referee and the Judge to be costs in the cause.

Re ST. BONIFACE BY-LAW NO. 800.

Before Robson, J.

Affidavit—Quashing by-law—Existence of probable grounds for quashing—Inquiry before County Court Judge—St. Boniface Charter, 7 & 8 Edw. VII, *c.* 57, *s.* 521.

Section 521 of the St. Boniface Charter, 7 & 8 Edward VII, c. 57, provides that, when an application to quash a by-law of the City Council under section 517 is pending before a Judge of the Court of King's Bench, if it is made to appear to him that probable grounds for the application exist, he may order an inquiry to be held "concerning the said grounds" before the Judge of the County Court of St. Boniface.

Held, that an affidavit of the applicant based on information and belief may be sufficient to warrant an order for such inquiry. The very reason for the investigation before the County Court Judge is that direct proof of the facts may not be otherwise available and it should be held sufficient for this purpose that it be made to appear reasonable to suppose that the inquiry will elicit facts bearing upon probable grounds alleged in support of the application.

DECIDED: 20th February, 1912.

Statement

AN application was made by Theophane Bertrand under section 517 of the St. Boniface City Charter to quash by-law No. 800, passed by the Council of that City.

While such an application was pending, a motion was made on behalf of the applicant for a direction under section 521 of the Charter for an order for an inquiry

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before the County Court Judge of St. Boniface concerning any probable grounds that might appear to exist for the motion.

A. Dubuc for the applicant.

H. P. Blackwood for the City of St. Boniface.

ROBSON, J. It is objected on behalf of the City that no such grounds have been so far shewn in that the only material is an affidavit of the applicant as to certain of those grounds, based on information and belief. But the very reason for the investigation is that direct proof of the facts may not be otherwise available. It is, I think, sufficient for the purpose that it appear reasonable to suppose that the inquiry will elicit facts bearing upon probable grounds alleged in support of the application.

The inquiry will be directed as to all the grounds mentioned in clauses (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) of the applicant's affidavit, but section 154 of the Charter must be observed—that is to say, no person shall be asked how he voted. See *Re Orangeville,* 20 O.L.R. 476; *Reg.* v. *Saunders,* 11 M.R. 563; *Re Shoal Lake,* 20 M.R. 40.

The costs of the investigation shall be costs in this proceeding, and the inquiry is ordered on the applicant's request only on that condition, to which he will assent by taking the order.

The order will provide as to notice of the inquiry and otherwise as in section 521 mentioned.

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IN THE COURT OF APPEAL.

LUMBERS V. MONTGOMERY.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, J.J.A.

Administration of estates—Devolution of Estates Act, R. S. M. 1902, *c.* 48, *s.* 21— 5 & 6 *Edward VII*, *c.* 21, *s.* 1—*Distribution—Parties to action—Suing administrator personally.*

Letters of administration of the estate of M. J. M. were issued to the defendant T.J.M. in April, 1889, the deceased having died in January of the same year. The estate consisted almost wholly of wild prairie farms and was divisible in the proportions of one-third to the administrator himself and one-sixth to each of four other next of kin.

Held, that the administrator had, in that case, power to sell the lands of the deceased without the approval of the District Registrar or other authority, as he might sell personal property of the deceased for the purpose of distributing the proceeds.

Held, also, that he had no right to distribute the estate by conveying, without their consent, to each of the next of kin an undivided one-sixth interest in the lands, but should exercise his power of selling the lands for distribution.

On the demand of one of the next of kin in an action for administration it is proper to order that the lands be sold for the purpose of distribution.

This action was originally brought against the defendant as administrator. During the proceedings in the Master's office, the defendant was added as a party in his personal capacity. On appeal to a Judge this order was discharged, but the Court of Appeal decided that, while perhaps this was not necessary, there was no reason why the administrator should not remain a party in his personal capacity.

DECIDED: 25th November, 1912.

Statement

THIS suit was instituted for the administration of the estate of Margaret Jane Montgomery by the plaintiff, one of her daughters, against Thomas Johnson Montgomery, the administrator.

After the decree was made, proceedings were taken in the Master's office during which Andrew Milton Thompson, Peter McDonald and Thomas Johnson Montgomery were made parties, the latter in his personal capacity.

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Subsequently an order was made discharging the order adding McDonald and Thompson as parties.

An order was also made in the Master's office for sale of the intestate's lands.

Although the time for leave to appeal had expired, Thomas Johnson Montgomery, acting in his personal capacity, obtained leave to appeal against the order adding him as a party in his personal capacity, and against the order for sale of the lands.

That application was heard before Robson, J., who discharged the order adding Thomas Johnson Montgomery as a party in his personal capacity and set aside the order for the sale of the lands.

The plaintiff then appealed to the Court of Appeal against the order of Robson, J.

E. K. Williams for plaintiff, appellant. Deceased died 1st of January, 1899. The Act respecting Estates of Intestates was consolidated as chap. 46, Consolidated Statutes, 1880, see sec. 2. By the Real Property Act, 1885, 48 Vic. c. 28, assented to 2nd of May, 1885, taking effect from 1st of July, 1885 (see sec. 2) and amended in 1886 by 49 Vic. c. 29, s. 5, which struck out the words "shall be held to be chattels real," real estate was to go as other personal estate to the personal representatives, see sec. 21. This was amended by 51 Vic., c. 22, s. 2 (1885), and consolidated by 52 Vic., c. 16, assented to 5th of March, 1899; see section 27, providing real estate to go as above. By section 33 this law was to be held to have extended from and after the 1st of July, 1885. This applies to this case. The amendment of 54 Vic. (1891), c. 6, s. 3, to section 27 above, which amendment gives express power to sell, is merely declaratory, and the right to sell existed previously to this amendment. The Devolution of Estates Act, c. 46, Consolidated Statutes, 1880, revised in 1892 as c. 45, R.S.M., contains, for the first time, provisions

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similar to those placed in the Real Property Act by 52 Vic., c. 16, s. 27, and 54 Vic., c. 6, s. 3. The lands in question were under the Real Property Act at the time of death. Administration was granted 23rd of April, 1899. The Administrator had power, and it was his duty to sell.

J. B. Coyne and *J. Galloway* for defendant. The history of administrators will be found in 9 Hen. 3, c. 18 (Magna Charta), 13 Edw. I., Stat. 1, c. 19; 31 Edw. III., Stat. 1, c. 11; *Chitty's Statutes,* 1865, Vol. 1, pp. 1408, 1410; 21 Hen. VII., c. 5, s. 3; *Chitty's Statutes,* 1865, Vol. 1, p. 1413; 22 and 23 Car. II, c. 10; Statute of Distributions; *Chitty's Statutes* (1865), Vol. 1, p. 1417; *Stephen's Commentaries,* Vol. 2, pp. 270, 273. The administrator could not originally sell lands except for payment of debts. When Parliament first provided that lands should go to the administrator there was no provision to sell, except to pay debts and costs of administration. The duty of administrator was to distribute in specie; no power to sell for purposes of distribution only. A power of sale was first given by The Real Property Act of 1891, c. 6, s. 3, and a power of sale for the purpose of distribution was given by The Devolution of Estates Act of 1895, c. 10, s. 1, but the power was limited where infants and lunatics were concerned to a sale with the approval of the District Registrar, and now by the statute of 1906 with the approval of the Registrar-General. See R.S.O. 1887, c. 108, ss. 8 and 9; *Re Mallandine,* 10 C.L.T. Occ. N. 226; *Re Fletcher,* 26 O.R. 499. Section 2 of the Act of 1895 made the statute retro-active from the 1st of July, 1885, and, from that date until the statute of 1895 came into force, the approval of the District Registrar was unnecessary. From 1895, therefore, until 1908, up to which dates infants were concerned, the lands could not have been sold without the consent of the District

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Registrar or Registrar-General. Until 1895 administrator had a discretion. At any time the administrator had the power to appropriate any assets to the share of a particular beneficiary. Under the Statute of Distribution, next of kin are residuary devisees and entitled to residue in specie: *Cooper* v. *Cooper,* L.R. 7 H.L. 62; *Blake* v. *Bayne,* [1908] A.C. 371, 383. Executors or administrators have power to appropriate instead of making sale and distribution: *Elliott* v. *Kemp,* 7 M. & W. 306; *Re Richardson,* [1896] 1 Ch. 512; *Barclay* v. *Owen,* 60 L.T. 220; *Watson* v. *Watson,* [1901] 1 Ch. 681, and see Imp. Act, 22 & 23 Vic., c. 25, s. 29, in same terms as section 41 of the Manitoba Trustee Act, R.S.M. 1902, c. 170, s. 41, where it is provided that an executor or administrator may distribute the assets of the testator, whereas a trustee is to distribute the proceeds of the Trust Estate. The Court will not order a sale to be made against the wishes of one of the beneficiaries where there are no debts: *Seton,* 1427; *Lees* v. *Lees,* L.R. 15 Eq. 151. After all the debts were paid the administrator became a bare trustee. A sale could only be had under proceedings for partition or sale: *Re Mallandine, ubi supra.* Misconduct of administrator cannot be gone into under the order for administration granted in this case: *Partington* v. *Reynolds,* 4 Dr. 253; *Smith* v. *Spilsbury,* 1 Dr. & Sm. 151.

Williams in reply. The order of the Master should be restored. The cases cited for the respondent are distinguishable. The English Acts are different. Distribution has not been made: 18 *Cyc.* 145. The administrator may sell and must do what is in the best interest of the estate.

HOWELL, C.J.M. Practically the whole of the estate of the intestate consisted of wild prairie farms.

The administrator allowed the land to remain without sale, appropriation or distribution for about 17 years and

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then, apparently with the consent of three out of four of the next of kin, conveyed to each of the three an undivided one-sixth part of each of these farms, and then each at once re-conveyed this undivided share to him, so that, with his undivided one-third, which he was entitled to as the husband of the deceased, he became the holder of an undivided five-sixths of the estate. He absolutely sold to other persons, not parties to this suit, two of the parcels of land. The administrator has, therefore, placed the estate in the position that, as to two parcels of land, there is left in him an undivided one-sixth, with the remainder in the hands of strangers, and, as to four parcels, he has vested in himself, which he claims in his individual right, an undivided five-sixths thereof, and that, as administrator, he holds only an undivided one-sixth share. He offers to convey to the plaintiff this undisposed of undivided one-sixth share, upon her paying to him her share of certain moneys found to be due him from the estate.

Counsel for the administrator strongly argued that an administrator of an estate, at all events where the assets to be distributed are real estate, can so administer, and does divide the estate by such conveyances and, apparently, whether they consent or not.

After the enactment of our Devolution of Estates Act, whereby real estate passed to the administrator in the same manner and subject to the same distribution as personal estate, the Act of 5 & 6 Ed. VII., c. 21, was passed, and evidently the draftsman desired to copy into our statute portions of the English Land Transfer Act of 1897, and perhaps without fully considering that in Manitoba the same persons took alike without distinction the real and personal estate of an intestate, whereas, in England, the rights of heirs at law are not disturbed as to real estate further than is necessary to vest the same in the personal representative for administration.

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I apprehend that an administrator would be liable to creditors for real estate assets in his hands in this country and that the remarks of *Robbins & Maw on Devolution of Estates,* at page 148, would not apply to Manitoba.

By placing in our Act, as section 21, s-s. (*d*), a practical copy of section 2, s-s. 3, of the Imperial Act, 60 & 61 Vic., c. 65, confusion may arise as to what is intended. The original section 21 in the Devolution of Estates Act. c. 48, is struck out and the English section 2 put in its place; but, instead of section 3 of the English Act, the Legislature enacted a new section 25 of the Devolution of Estates Act and repealed section 19 of the Trustee Act.

This new section gives power to the administrator to sell real estate for various purposes and, amongst others, for the purpose "of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not," a power which the administrator has not got under the English Act. I can readily see the necessity for section 2 of the English Act, for Parliament desired to preserve to the heir-at-law his rights to the real estate or to the proceeds of the sale, if one was required to pay debts or charges; but as, in the original Manitoba Act, all estate, both real and personal, went to the same parties, I do not understand why the clause was copied into our Act, and I cannot see why it was necessary, therefore, to complicate matters by declaring in s-s. (*b*) that the personal representative shall hold the land as trustee for the person beneficially entitled. If it was necessary here it was equally necessary as to personal estate.

After careful reflection I do not think that the Legislature intended by that sub-section to create a difference between real and personal estate in the title or holding of the administrator, and that his trust relationship is the same in both classes of the estate.

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The late Mrs. Montgomery died in January, 1889, and a few months later administration was granted to the defendant and it may be that the last mentioned statute does not apply to this case; but, as the changes in the law therein made do not affect this case in the conclusions to which I have arrived, it is not necessary to decide that difficult point.

Text writers and Judges lay down the duties of administrators to be "to realize the assets," "to distribute the estate," "to get in the assets." "The executor has absolute dominion over the estate for distribution" * * "and of course he can divide it, for that is the very reason why he was appointed," per Kay, J., in *Barclay* v. *Owen,* 60 L.T. 222.

"For the benefit of creditors and for the facility of division among the next of kin, the estate is to be turned into money:" Lord Cairns in *Cooper* v. *Cooper,* L.R. 7 H.L. 53.

In the case of *Re Fletcher,* 26 O.R. at 505, Osler, J., held under similar legislation that the administrator was not bound to sell where the parties entitled to the real estate consisted of one person only, and a widow's right to dower. No doubt the reason being that one person only was entitled subject to a life estate in one-third of the land which could by law be assigned. If in such a case there was a sale it would be difficult to calculate the widow's right or share in the purchase money.

Where all the parties entitled agree that they do not want the estate divided, the administrator should hand it over to them undistributed and undivided. See the language of Lord Cairns in *Cooper* v. *Cooper, supra, Blake* v. *Bayne,* [1908] A.C. 371.

Lord Cairns in that case set forth fully the nature of the estate or right of the next of kin in the estate of the intestate, and Lord Hatherly, at page 72, held that, where all the parties entitled desired the property to be

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handed over to them undistributed, the administrator must comply with this request.

This is not a case of handing over or conveying a particular parcel of the estate by way of appropriation as is often and properly done by administrators. If the estate is of such a nature that the administrator could reasonably divide, and thus distribute it amongst the parties entitled, this he might, and probably should, do instead of converting into money.

In my view of the law, I do not think the administrator, so far as the plaintiff's share is concerned, has distributed the estate as to the four parcels of land which are still in his name, and I do not think he acted properly in his disposition of the other two parcels. The parties who accepted the conveyances have taken that method of distribution and cannot complain.

I think the order for sale of the four parcels should stand.

Owing to the tangle in which this suit now stands, it would be well to direct that the plaintiff take from the administrator the undivided one-sixth share in the two parcels sold to strangers as her share in the distribution of these two parcels.

The administrator has been made a party defendant personally and, while perhaps this was not necessary, I see no reason why he should not remain a party individually.

To the extent indicated above, the order of Mr. Justice Robson will be set aside and the appeal allowed. The appellant is to have the costs of this appeal and of the application before Mr. Justice Robson.

PERDUE, J.A. The intestate in this case died on 1st January, 1889. In the month of April, 1889, letters of administration of her estate were issued to her husband the defendant T. J. Montgomery. At the time of the death of the deceased the enactment in force as to the

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descent of real estate, where the owner died intestate, was contained in 51 Vic. (1888) c. 22, s. 2, which is as follows: "Land in the Province shall go to the personal representatives of deceased owners thereof in the same manner as personal estate goes." By 52 Vic., c. 16, s. 27, which came into force on 5th March, 1889, that provision was re-enacted and, by section 33 of the same statute, was declared to have extended from 1st July, 1885, and thenceforth to all land in the Province and every estate and interest therein.

The effect of the letters of administration issued to the defendant was to confer upon him as the personal representative of the deceased the right and duty of administering her estate both real and personal, and in his administration he was to take and deal with the real estate in the same manner as if it were personal estate. This was the obvious meaning of the enactment in force when the defendant took upon himself the administration of the estate of the deceased.

By 54 Vic. (1891) c. 6, sec. 3, the above section 27 was amended by adding at the end thereof the words: "and the personal representative shall have power to dispose of and otherwise deal with all land so vested in him, with all the like incidents but subject to all the like rights, equities and obligations as if the same were personal property vested in him." I must confess that I am unable to see why this amendment was deemed necessary, or how it gave any extended meaning to the section. If land went to the personal representative of the deceased in the same manner as personal property, then he had power to sell or otherwise deal with it as if it were personal property. Therefore, it appears to me, the administrator in the present case had under the administration issued to him in 1889 full power to sell the land whether to pay debts or for the purpose of distribution, or otherwise, as he might lawfully deal with personal estate.

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Section 3 of the Act of 1891 is, it seems to me, merely declaratory of the meaning of section 27 of 52 Vic. c. 16, and 51 Vic. c. 22, s. 2, a meaning which these sections would carry without the addition made by section 3. The amendment was probably made to show more clearly the true purpose of the legislation from the beginning and to ease the minds of lawyers who were obsessed with the sanctity of real estate and the old laws governing its descent.

The provisions of 52 Vic. c. 16, ss. 27, 33 and 54 Vic. c. 6, s. 3, were consolidated in the Revised Statutes, 1892, as section 21 of the Devolution of Estates Act. In 1895 (58 & 59 Vic. c. 10, s. 1) this latter Act was further amended by adding a new section, s. 25. This section empowered an administrator in whom the real estate of an intestate was vested to sell the real estate not only to pay debts but for the purpose of distributing the estate. Provisoes were added to the section, one of which was that, where infants or lunatics were interested and there were no debts, the approval of the District Registrar should be obtained in order to make a sale valid. But sub-section (2) declared that nothing in the section should derogate from any right or power theretofore possessed by an executor or administrator. The section was further amended in 1898 (c. 15, s. 2) and in 1900 (c. 9); but these amendments do not affect the present case. The enactments relating to the power of an administrator to sell real estate, and the qualification of such power, were consolidated in the Revised Statutes, 1902, c. 170, s. 19, with the saving proviso: "nor shall anything in this section contained derogate from any right or power possessed by the administrator before the twenty-ninth day of March in the year one thousand eight hundred and ninety-five." The enactment relating to the vesting of the real estate in the administrator was contained in the Devolution of Estates Act, R.S.M. 1902, c. 48, s. 21.

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PERDUE, J.A.

By 5 & 6 Ed. VII., c. 21, s. 1, both the above last-mentioned sections were repealed and new sections substituted in their place. These new sections were adopted from the Imperial Land Transfer Act, 1897. It is not necessary in this case to consider the effects of the changes made by 5 & 6 Ed. VII., c. 21, in the powers of an administrator over the real estate of the intestate. By section 2 it is declared that the provisions of the Act, which are not merely declaratory, shall not be retroactive. The changes in the law introduced by the Act do not apply to the administration issued in the present case.

The result is that the administrator in this case had power to sell the lands of the deceased, without obtaining the approval of the District Registrar or other authority, as he might sell personal property of the deceased for the purpose of distributing the proceeds and this power was not taken away by subsequent enactments. Instead of selling the land and distributing the proceeds, he obtained from the heirs of the deceased, except the plaintiff, conveyances of five-sixths interests in the lands, leaving, as he claims, one-sixth only in himself as administrator, out of which one-sixth the plaintiff's interest would, according to his contention, have to be paid. If this contention were sustained, the other heirs, including himself, would have received their full shares in the lands several years ago and any expense since incurred by him as administrator might have to come out of the plaintiff's share. Even if he were to convey to the plaintiff a clear undivided one-sixth in the land, she could not realize from that fraction as much as if the land were sold out and out and one-sixth of the proceeds paid to her.

The administrator's dealing with the real estate of the deceased, by conveying undivided fractions of it to some of the next of kin and retaining a fraction in his hands, was not such a distribution as is contemplated by the law.

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I think that the appeal should be allowed and that an order should be made in the terms mentioned in the judgment of the Chief Justice.

RICHARDS, J.A., CAMERON, J.A., and HAGGART, J.A., concurred.

RE P. E. H.

Before MATHERS, C.J.K.B.

Barrister—Solicitor—Law Society Act, R.S.M. 1902, *c.* 95, *s.* 74—*Striking barrister off the rolls—Unprofessional conduct.*

A barrister, although he is not also a solicitor, may be struck off the roll of barristers or otherwise punished for professional misconduct, on a summary application under section 74 of the Law Society Act, R.S.M. 1902, c. 95, even when the work in respect of which the complaint arose was not done in his capacity as a barrister, and was something that might have been lawfully done by a person who is neither a barrister nor a solicitor, provided it is of a kind which is usually entrusted to a solicitor in this Province because of his profession.

Hands v. *Law Society of Upper Canada*, (1889) 16 O.R. 625, *In re Hulm & Lewis*, [1892] 2 Q.B. 261, and *Re Hurst & Middleton*, (1912) 56 Sol. Jour. 520, followed.

In re J.B., an Attorney, (1889) 6 M.R. 19, distinguished on the ground that the wording of the statute in force when it was decided has been altered.

It appeared that Mr. H. had been employed by his client, a man of no business experience and of but very moderate understanding, to attend to the execution by him of a discharge to the executors of an estate in Scotland on payment of a sum of about £500 coming to the client, and procured the client to sign an agreement by which he, H., should receive one third of the amount, and that he actually collected and retained $817 for his services.

Held, that this was professional misconduct such as to justify the Court in exercising its summary jurisdiction under the statute.

Judgment of suspension from practising in any Court in this Province for a period of nine months.

DECIDED: 4th June, 1912.

Statement

APPLICATION under section 74 of the Law Society Act, R.S.M. 1902, c. 95, to strike P. E. H. off the roll of Barristers for unprofessional conduct.

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Argument.

R. M. Dennistoun, K.C., for the Law Society of Manitoba cited *Re J.B.*, 6 M.R. 19.

E. J. McMurray for H. cited *Re J. B.*, 6 M.R. 19; *Hands* v. *Law Society*, 16 O.R. 627, 17 A.R. 41, and *In re Solicitor*, [1894] 1 Q.B. 254.

MATHERS, C.J. K.B. The facts in this case are briefly these: One Alexander Fyfe, a teamster, was entitled to a sum of money under the will of a Miss Edwards of Forfar, Scotland. He had received from the Scottish solicitors of the estate a letter dated the 28th of April, 1911, stating that they hoped shortly to send him a statement of his share and a discharge for his signature, and that they would send the balance of his share on receiving a discharge, and that such balance amounted to between £400 and £500. He went to P. E. H. on the 6th June, 1911, with this letter and retained him to act as his solicitor in the transaction. H. first stipulated that he should be paid one half of the amount received as his fee but, on Fyfe objecting that that was too great an amount, reduced his demand to one-third. H. then drew an agreement, dated 7th June, 1911, which Mr. Fyfe signed on that day, agreeing to pay as his retainer one-third of any moneys recovered by way of action, compromise or otherwise.

On the 6th September, 1911, the Scottish solicitors sent to H. a letter of credit on the Bank of Montreal for £502 5s. This amount was duly received by H. He retained one-third, amounting to $817 and paid over to Fyfe the balance, about $1,622.

Fyfe, being dissatisfied with the amount he received, applied to another solicitor, who took proceedings under the recent amendment to the Law Society Act to have the agreement of the 7th June, 1911, reviewed by the senior taxing officer. Mr. Walker, after taking evidence and hearing the parties, set the agreement aside.

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An appeal was taken from this decision, which appeal was dismissed by Mr. Justice Robson.

The foregoing outline of the principal facts I have taken from the depositions, letters and papers admitted in evidence before Mr. Walker, which, by consent of counsel, were used on this application.

In order to understand the whole circumstances it is necessary to make a more detailed reference to the evidence.

At the time H. obtained from Fyfe the agreement to pay him for his services one-third of the amount to be received, he had before him a letter of the Scotch solicitors to Fyfe, dated the 28th of April, and had written them a letter of the 6th June. The former letter is very important as showing that the amount to be received was between £400 and £500; that it would shortly be remitted, and that all the legal work necessary to be done on this side would be to attend to the execution of a discharge to the trustees when it should be sent out for that purpose. The letter written by H. of the 6th of June is important because it shows that he must have read the letter of the 28th April, and then knew exactly how the matter stood. In that letter he says "We (*sic*) have been retained by Mr. Alexander Fyfe to act for him in the above matter and have been instructed by him to ask you to remit us the £500 or thereabouts as stated in your letter to him, which is the amount coming to him under the above. On receipt of this amount we will have Mr. Fyfe sign the necessary documents discharging and releasing the trustees. Yours truly, P. E. H." H. produced all other letters received and copies of letters sent, but that of the 28th April and 6th June. He pretended that he had not seen the letter of 28th April, and it is not difficult to infer his reason for withholding his copy of the letter of June 6th. But he did not stop there. When

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asked to state the purport of the letter he had read but did not produce he answered, as appears by the stenographer's notes of the proceedings before Mr. Walker: "Letter from Messrs. J. & R. H. Anderson, a firm of solicitors with reference to some estate matters, Miss Edwards and Dr. Edwards, saying that the possibilities are that there will be some money left to him; that they didn't know whether they could wind up the estate now or not or if it would be held over for some years on account of some law in vogue at that time." No letter written by Messrs. Anderson contained any such statements. I am forced to the conclusion that H. not only suppressed the letter of the 28th April, but deliberately mis-stated its contents for the purpose of misleading the taxing officer. He is not proceeded against for that offence, but it has an important bearing on the value to be attached to his evidence. Fyfe was asked if he had read the letter and he replied that he had but could not understand it. He was brought to H.'s office by a friend of his, apparently a bar-tender. He says H. read the papers (*i.e.* the letters) and "told me he would require may be a half and then he considered and he said I will take a third of it, and as I didn't know but just I had to do what he told me when I signed my name to this paper."

I would infer from Fyfe's evidence that he was a man with no business experience and of but very moderate understanding. It is quite apparent that H. did not explain to him the nature of his rights as it was his duty to do, but on the contrary he invented or grossly exaggerated the difficulties in the way of his getting the money. He admits he told Fyfe he might have expensive litigation before it was secured. He told him that, although he knew at the time the fair value of the legal work incident to procuring this money could not exceed $50. In this way he procured the

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agreement which the senior taxing officer very properly set aside as unfair and unreasonable.

It does not necessarily follow that, because an agreement has been set aside as unfair, the conduct of the solicitor or barrister who obtained it must be regarded as unprofessional. Each case must depend upon its own circumstances. The facts of this case leave no room for doubt or hesitation. The conduct of the accused member in obtaining the agreement in question under the circumstances stated was extortionate and in my opinion highly unprofessional.

H. is not a solicitor and it is contended that, as the work or service which he performed was that of a solicitor and not a barrister, there is no power to strike him off the rolls or discipline him in the latter capacity.

In support of this contention *In re J. B., an Attorney.* 6 M.R. at 19, is relied upon. That was an application to strike a member of the Law Society off the rolls both as a barrister and an attorney. The ground of complaint was that he had collected certain mortgage moneys which he retained and appropriated to his own use, representing to his client that the moneys had not been received by him. The Full Court of Manitoba held that, as the conduct complained of was conduct as an attorney and not as a barrister, there was no power to strike him off the rolls as a barrister, and an order was made striking him off as an attorney.

That application was made under the Act then in force which provided that:

"It shall be lawful for the Court of Queen's Bench upon a rule *nisi* to hear and determine any complaint that may be made against any member of the Law Society in discharge of his duties as barrister or an attorney at law and such member of the Society may, according to the gravity of the offence and the discretion of the Court of Queen's Bench, be either suspended from

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practising in any Court of this Province or struck off the rolls and disabled from practising either as an attorney or solicitor or barrister in any of the said Courts."

Since that decision and in consequence of it, the law was amended and section 74, before referred to, now enacts as follows:

"It shall be lawful for the Court of King's Bench upon notice of motion to hear and determine any complaint made against any member of the Law Society for unprofessional conduct or misconduct as a barrister, attorney or solicitor and such member of the Law Society may, according to the gravity of the offence and in the discretion of the Court of King's Bench, be either suspended from practising in any Court of this Province or struck off both or either of the rolls and disabled from practising either as an attorney, or solicitor or as a barrister or in all of said capacities in any of the said Courts."

In Ontario the power to discipline members of the profession is vested in the Law Society and not, as in Manitoba, in the Court. The Ontario statute then in force provided that, whenever a member of the Society had been found by the Benchers after due inquiry by a committee of their number or otherwise guilty of professional misconduct or of conduct unbecoming a barrister, solicitor, etc., it should be lawful for them to disbar such barrister and resolve that such solicitor is unworthy of practising. R.S.O. 1897, c. 172, s. 44.

In *Hands* v. *Law Society of Upper Canada,* 16 O.R. 625, the facts were briefly as follows: Hands, a barrister and solicitor, obtained from a young woman aged 23 years a power of attorney to sell $1,500 worth of bank stock, which represented about one-half of her worldly substance. He used this power of attorney to transfer the stock to himself in trust for her, and afterwards to himself absolutely. One-third of this stock he then sold and paid the proceeds to the credit of his wife in another bank and the remaining two-thirds he pledged to a bank for advances to himself as such stock-

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holder. The young woman was an orphan and at the time a guest in the solicitor's house, and she relied on him as a friend and as a member of the legal profession. After some months, getting no satisfaction as to what was being done with her property, she brought an action for its recovery and was met by defences denying all liability. The matter was brought before the Law Society and the committee found that the complaint was fully established, and that Hands had been guilty of conduct unbecoming a barrister and solicitor and recommended that he be disbarred and his name erased from the roll of solicitors. He then brought an action against the Law Society to have it declared that the resolution of the Benchers founded upon the committee's report should be declared void and to restrain them from taking further proceedings. The action was tried before Chancellor Boyd and dismissed. At page 636 he said:

"Speaking generally, any misconduct which would prevent a person from being admitted to the Society justifies his removal, because it indicates that he is unsafe and unfit to be entrusted with the powers and privileges of an honorable profession and a confidential office. The conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister, a degree of greater rank and honour in the law; and where practitioners, as in this Province, usually combine the functions of both branches of the profession, it is impracticable to discipline the solicitor and let the barrister go free. In the case in hand the broad question presented itself: was the solicitor's conduct unbecoming and unprofessional?"

This decision was reversed by the Divisional Court, 17 O.R. 300, but was restored by the Court of Appeal, 17 A.R. 41. It appears from the judgment of Chief Justice Taylor, in *Re J. B., an Attorney,* who refers to the *Hands* case, just then decided in the Court of Appeal, but not reported, that he was under the impression the Divisional Court's judgment had been sustained in the Court of Appeal and not reversed and the Chancellor's judgment restored, as the fact was. Whether or

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not the conclusion he arrived at would have been different had he been aware of the fact that the Chancellor's judgment was restored, it is impossible to say. The judgments of Killam and Bain, JJ., make no reference to the *Hands* case, but go entirely upon the fact that the Act, as then in force, only gave the Court power to deal with a complaint made against a member of the Law Society in discharge of his duties as a barrister or as an attorney; and, as no charge had been brought against the attorney in his capacity as a barrister, but only against him in his capacity of an attorney, there was no power to discipline him as a barrister.

Mr. Justice Killam, in his judgment at p. 25, and Mr. Justice Bain, in his judgment at p. 28, make this quite clear. The judgment of Mr. Justice Bain at the page named contains the following passage:

"With us the two professions are usually combined in one and the same person, and in cases like the present where dishonesty or other personal misconduct is proved, and the Court strikes the offender off the attorneys' roll, because it can no longer accredit him as one worthy of confidence, it is absurd that the same individual should still be accredited to practise in the higher and more honorable position of a barrister. Such an anomaly could never have been intended, and I regret that the wording of the section compels me to put the construction I have upon it. In Ontario, a barrister may be disbarred, or a solicitor struck off the rolls, not only for professional misconduct, but for conduct unbecoming a barrister or solicitor, and we should have a similar provision in our statutes."

The work that H. undertook was possibly not such as an unqualified person is prohibited by section 52 of The Law Society Act from undertaking. It was a class of work which, however, in this Province is usually transacted by solicitors. The business is entrusted to them because of their profession. The client in this instance went to H. because of his professional character and in that capacity he dealt with him. The summary jurisdiction of the Court over solicitors is not confined to those who are *de jure* such, but extends also to those who assume to act as solicitors without having the

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necessary qualifications: *In re Hulm & Lewis,* [1892] 2 Q.B. 261, recently followed in *Re Hurst & Middleton,* 56 Sol. Jour. 520. It is pointed out by Taylor, C.J., in *Re J. B., an Attorney,* at p. 23, that under the English authorities, where a person is employed to do business because of his being an attorney, he will be dealt with summarily by the Court, even where the misconduct is in matters in which he was not acting strictly as an attorney. I am, therefore, of opinion that the summary jurisdiction of the Court extends to H. as fully as if he were a duly qualified solicitor and the business with which he was engaged was strictly solicitor's work.

The question is, under these circumstances, can he be disciplined as a barrister?

The Ontario Act under which the *Hands* case was decided permitted the offending member to be dealt with not only for professional misconduct, but for conduct unbecoming a barrister or solicitor. Our Act only enables the Court to deal with cases of unprofessional conduct or misconduct as a barrister or solicitor. It is apparent that the Ontario Act is, in that respect, wider than the Manitoba statute. Any disgraceful or dishonourable conduct, although in no way connected with his professional character, would be conduct unbecoming a barrister although it might not be unprofessional conduct, which must necessarily be conduct in relation to his profession. In another respect, however, I think the Manitoba Act confers upon the Court as wide powers as the Ontario Act confers upon the Benchers. Section 74 gives the Court power to entertain a complaint against a member of the Law Society for unprofessional conduct or for misconduct as a barrister or as a solicitor. It goes on to provide that according to the gravity of the offence the Court may strike the offender off one or both of the rolls. That means, I think, that if a member has been guilty of an offence in either character he may be disciplined in one or both characters. I think this is the result of a fair reading of the section. I am confirmed in the

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opinion that such was the legislative intention by the fact that the legislation was enacted to meet a similar difficulty pointed out by the Court in *Re J.B., an Attorney.*

I entirely agree with the statement of Chancellor Boyd in the *Hands* case that "the conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister, a degree of greater rank and honor in the law." And, if a solicitor, who is also a barrister, has been guilty of an offence justifying his suspension or expulsion in the former character, the same misconduct would justify his suspension or expulsion in the latter character also. The fact that H. is not a solicitor cannot save him in his character of a barrister. It would be a strangely anomalous situation if the fact that he does not happen to be a *de jure* solicitor should save him as a barrister from the consequences of misconduct in the assumed character of a qualified solicitor whereas he would enjoy no such immunity if he were in fact a solicitor.

For these reasons I think the application of the Law Society is entitled to succeed.

The fact that H. has made restitution affords no defence to the application. It is a matter, however, which may properly be taken into account when considering the question of the punishment to be awarded. The rule of the Court is stated by Mr. Justice Grove in *Re a Solicitor,* 62 L.T. 446, and quoted with approval by Boyd, C., at 638:

"An immediate payment, when first asked, may be something upon which to appeal to the consideration of the Court; but merely raising money at the last moment, when being struck off the rolls is imminent, does not alter the question."

The disciplining power conferred upon the Court is not alone for the purpose of satisfying the individual

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client who has suffered by the member's misconduct. It is conferred for the general protection of the public against an unsafe member of a privileged class.

So far as the evidence discloses this is H.'s first offence. He is a young man who has yet his way to make in the profession and I do not think this, his first lapse from the path of rectitude, should be visited by the extreme penalty of striking him off the rolls, although under other circumstances the gravity of his offence would justify that course. I think the case will be met by an order suspending him from practising in all Courts of this Province for a period of nine months, and judgment will go to that effect.

Re THOMAS DOUGLAS SMITH, DECEASED.

Before GALT, J.

Will—Misnomer—Mistake in name of legatee—Extrinsic evidence of intention of testator.

The testator's will left a legacy to the "Old Peoples' Home, being a charitable institution carried on at or near Winnipeg."

There was no institution of that name at or near Winnipeg, but there was The Old Folks' Home at Middlechurch, a place a few miles north of the city, and also an institution at St. Boniface near Winnipeg called La Maison des Vieux or, in English, Old Peoples' Home or Old Folks' Home. The former institution was managed by a board largely composed of members of the Presbyterian Church to which the testator belonged and he had frequently contributed money to its support and had expressed his intention to remember it in his will, whereas the other institution was managed by the Roman Catholic Church and it did not appear that the deceased had ever contributed to its support or even known of its existence.

Held, that the testator must have intended the legacy for the Old Folks' Home and it should be paid to that institution.

British Home and Hospital for Incurables v. *Royal Hospital for Incurables*, (1904) 90 L.T. 601, referred to.

DECIDED: 3rd December, 1912.

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Statement.

APPLICATION on behalf of the executors of the estate of the late Thomas Douglas Smith for advice under the provisions of the Manitoba Trustee Act. By letters probate issued out of the Surrogate Court on the 13th day of June, 1911, The Prudential Trust Company of Canada and Herbert Patrick Pennock were appointed executors of the last will and testament of the deceased.

G. W. Jameson for executors.

J. A. Beaupre for Hospice Youville.

GALT, J. Under the terms of the will the deceased bequeathed the sum of $10,000 to "the Old Peoples Home, being a charitable institution carried on at or near Winnipeg." It appears from the affidavits that there is no such institution as the Old Peoples Home in or near Winnipeg; but there is an institution named The Old Folks Home, situate at Middlechurch, and there is also an institution at St. Boniface, now called the Hospice Youville, but, up to one year ago, called La Maison des Vieux, which might be translated into English as either Old Peoples Home or Old Folks Home or otherwise. The question is which (if either) of the above two institutions is entitled to the bequest.

When this application first came before me on November 28th, the material appeared to be defective, and the application was enlarged until to-day with liberty to both parties to supplement their material as they might see fit.

In support of the claim of the Old Folks Home the following evidence was given:

John H. Falk, Secretary of the Associated Charities of Winnipeg, identifies the two above named institutions, and states that the Old Folks Home is an institution maintained as a branch of the Women's Christian Temperance Union, while the Hospice Youville is maintained by the Roman Catholic Church.

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William Harvey, chairman of the finance committee of the Old Folks Home at Middlechurch, states that he knew the late Thomas D. Smith as a member of Knox Presbyterian Church in the City of Winnipeg; that the ladies of the board of the Old Folks Home are largely composed of members of Knox Church; that the late Thomas D. Smith was, to the knowledge of the deponent, a warm and euthusiastic admirer of the Old Folks Home, having been a donor in his lifetime towards the building fund, and that the Old Folks Home is frequently referred to as the Old Peoples Home.

Margaret Thompson, president of the Women's Union, states that the said Home is frequently known and referred to in the City of Winnipeg as the Old Peoples Home; that the Union frequently receives donations to the said Home under the name of the Old Peoples Home; and that an instance of this occurred when the last grant to the Home was given by the City of Winnipeg in which case the same was addressed to the Old Peoples Home.

Bella Scott, a member of the said Women's Union, states that she has been on the board of management for about fourteen years; that she well knew the late Thomas Douglas Smith during his lifetime, and that on several occasions he gave her money by way of subscription to the Old Folks Home; that on the 12th day of July, 1910, the deponent met the late Thomas Douglas Smith on Main Street, Winnipeg, on an occasion when she was engaged in selling buttons of the Old Folks Home, and on that occasion the deceased gave her money for the Home and told her, in the course of the conversation, that he would remember the Old Folks Home in his will.

The only evidence filed in support of the claim of the Hospice Youville, formerly La Maison des Vieux, is the affidavit of M. Ryan, Secretary of Les Soeurs de la

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Charite de L'Hopital General de St. Boniface. The deponent states that until about one year ago the said institution was called in French La Maison des Vieux, meaning in English the Old Peoples Home; that the said institution is still commonly known and called by the English-speaking people the Old Peoples Home, or the Old Folks Home; that it is situated on Tache Avenue, St. Boniface, near the City of Winnipeg; that during the last ten years there were a total of 357 people received in said institution, of whom 263 were from the City of Winnipeg; and that old people are received in the said institution irrespective of their nationality or creed.

In the case of *British Home and Hospital for Incurables* v. *Royal Hospital for Incurables,* 90 L.T. 601, the testatrix bequeathed £500 each to the Royal Home for Incurables, Streatham, S.W., and to St. Mary's Orphanage. It appeared that the British Home and Hospital for Incurables was situated at Streatham, S.W., but the Royal Hospital was situated at West Hill, Putney Heath. The testatrix was shown to have contributed for some years to both institutions. Kekewich, J., held that the British Home and Hospital for Incurables was entitled to the legacy, but his decision was reversed by the Court of Appeal. In giving judgment, Stirling, L.J., says: "The testatrix gives by her will a legacy to the British Home for Incurables. She then recites, by a codicil made nearly five years afterwards, that she had given certain legacies, and, amongst others, one to 'the British Home for Incurables, Streathem, S.W., £500.' The amount is incorrect, no doubt, but still she had given one to that institution. She proceeds: 'I hereby revoke all the said legacies, and instead thereof I gave £500 each, subject to duty, to the Royal Home for Incurables, Streatham, S.W.' The lady was perfectly well aware of the existence of the two institutions, one called in strictness 'the British Home and Hospital for Incurables,' and the

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other 'the Royal Hospital for Incurables.' She had been in the habit for years of giving donations to both; and we have in a memorandum-book in which she recorded her benefactions, occurring repeatedly and in successive lines, gifts to these two institutions."

In the present case the claim by the Old Folks Home appears to be much stronger than the claim of the Royal Hospital for Incurables in the case just cited, inasmuch as it does not appear that the testator had ever contributed anything to La Maison des Vieux or had even heard of the institution, whereas he was well acquainted with the management of the Old Folks Home, and had contributed to its finances, and had on one occasion gone so far as to indicate an intention to assist the institution by his will.

Under these circumstances, I hold that the Old Folks Home was intended by the bequest in question and is entitled to the legacy.

The costs of all parties will be paid by the executors out of the fund in question.

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ATTORNEY-GENERAL v. WINNIPEG ELECTRIC RY. CO.

Before Mathers, C.J.K.B.

Attorney-General—Res judicata—Pleading—Amendment—Municipality —By-laws—Nuisance.

This action was brought by the Attorney-General as plaintiff, on the relation of the City of Winnipeg, and by the City in its own right, to restrain the defendants from erecting a gas tank on a particular location in the City, and from maintaining the same there as it was alleged to be a public nuisance. The plaintiffs, by their statement of claim, alleged that three by-laws of the City prohibited the erection of the tank. The defendants denied the validity of the by-laws, and set up that, by virtue of the powers derived from another company, they were not subject to the by-laws.

At the trial, the defendants sought to amend their statement of defence by setting up that the question of their having these powers was *res judicata* because of the judgment of the Judicial Committee of the Privy Council in a former action brought by the City corporation alone against the defendants. (See 20 M. R. 337, [1912] A. C. 355).

Held, that, as against the City corporation, the amendment should be allowed, and the defendants should have an opportunity of proving the added defence. But

Held, that, as against the Attorney-General, the amendment should not be allowed. He was not a party to the former action; and, if in this suit he had any independent rights, he was not bound by the proceedings in the former action. The fact that he sued at the relation of the City corporation made no difference. He represented the Crown and the Crown alone, and could have sued without a relator, as well as with one. The object in having a relator is for the protection of the Crown against costs—not for the protection of the defendant.

Attorney-General v. *Logan*, [1891] 2 Q. B. 100, followed.

College of St. Mary Magdalen v. *Attorney-General*, (1857) 6 H. L. Cas. 187, and *People* v. *Holladay*, (1892) 29 Pac. Rep. 54 distinguished, the latter on the ground that a municipality in Canada does not represent the people of the Province or the general public.

Held, also, that, in such a case as the present, the only party who can sue for the protection of the public right is the Attorney-General.

Devonport v. *Tozer*, [1903] 1 Ch. 759; *Attorney-General* v. *Wimbledon*, [1904] 2 Ch. 34, and *Attorney-General* v. *Pontypridd*, [1908] 1 Ch. 388, followed.

By-laws of a municipality validly passed have, within its territorial limits, the same effect as an Act of Parliament has upon the subjects at large.

Hopkins v. *Swansea*, (1839) 4 M. & W. 640, and *Yabbicom* v. *King*, [1899] 1 Q. B. 448, followed.

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No admissible amendment material to the case of the party applying should be refused unless the opposite party cannot be compensated by costs.

This rule, of course, does not apply when the matter proposed to be pleaded would constitute no ground of action or defence as against the opposite party or when the application is not made or dealt with until the conclusion of the evidence, and the truth of the allegation sought to be introduced is not shown by the evidence.

DECIDED: 21st August, 1912.

Statement

THIS suit was brought by the Attorney-General at the instance of the City of Winnipeg against the Winnipeg Electric Railway Company.

The City claimed that the defendants had started to erect, and were erecting at the time of the filing of the statement of claim, gas works within the City of Winnipeg without having any legal right or power so to do, and without having obtained the permission of the Council, contrary to the provisions of the by-laws of the City, and within the prohibition area set out in by-law No. 6122.

The property on which the gas holder was erected was on the south side of Ida Avenue, between Lipton and Ruby Streets.

The statement of claim asked for a declaration that the defendants had not the right to erect the gas works without the premission of the City and, at the time the statement of claim was issued, an interlocutory injunction was asked for to restrain the Company from the erection of the works, and for a further order that the Company might be ordered to remove the gas works.

Since the statement of claim was issued the gas holder had been completed and had been put into operation.

The defence filed by the Company was that the City by-law No. 5942, prohibiting persons or corporations other than the municipal corporation of the City of Winnipeg from building gas works, was illegal because it created a monopoly and was, therefore, contrary to public policy

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and could not be maintained in law. Questions were also raised as to the validity of the by-laws passed by the City.

The Winnipeg Electric Railway Company claimed the rights originally granted to the Manitoba Electric and Gas Light Company in 1880 which had been assigned to the Winnipeg Electric Railway Company and under which the latter Company took over and continued to operate the gas plant.

It was further set up that the City must have approved of such transfer, as it had been receiving gas from the defendants and paying for the same from month to month and had issued permits for the construction and erection of gas mains in the City.

The defendants at the opening of the trial applied to amend their defence by pleading that the plaintiffs were estopped by the judgment in a former action brought by the City of Winnipeg alone against these defendants from denying that the defendants possessed all the powers of the Manitoba Electric and Gas Light Company. The application was opposed by both the Attorney-General and the City and the decision of the question was deferred until the evidence had been heard, permitting the defendants in the meantime to adduce evidence as though the amendment had been allowed. At the close of the evidence the defendants' counsel renewed the motion, and after hearing argument judgment was reserved.

J. H. Munson, K.C., E. Anderson, K.C., and *D. H. Laird* for defendants cited 24 *Am. & Eng. Encyc.* 755; *Caspersz on Estoppel,* 183; *People* v. *Holladay,* 29 Pac. 54; 36 Pac. 927; *Ballantyne* v. *MacKinnon,* [1896] 2 Q.B. 456; *Re Alison,* L.R. 9 Ch. 1, 25-6; *Priestman* v. *Thomas,* 9 P.D. 75; *Flitters* v. *Allfrey,* L.R. 10 C.P. 35; *Humphries* v. *Humphries,* [1910] 2 K.B. 531; *Cooke* v. *Rickman,* [1911] 2 K.B. 1125; *Citizens Light & Power Co.* v. *St. Louis,* 34 S.C.R. 495; 30 C.L.T.

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963; *Atty.-Gen.* v. *Fonseca,* 17 S.C.R. 612, 619, and *Everest & Strode on Estoppel,* 96.

I. Pitblado, K.C., for Attorney-General cited Vol. 2 *Smith's Lead. Cas.* (11th ed.), 752, 755, *et seq.; Re Deeley,* [1895] 1 Ch. 687; 16 *Cyc.* 685, 712, 716, 778, 780; *In re Alison,* L.R. 9 Ch. 26; *Priestman* v. *Thomas,* 9 P.D. 75; *Humphries* v. *Humphries,* [1910] 2 K.B. 531; *Cooke* v. *Rickman,* [1911] 2 K.B. 1125; *Ballantyne* v. *MacKinnon,* [1896] 2 Q.B. 462; *Everest & Strode,* 92, 98; *Humphrey* v. *The Queen,* 2 Ex. Ct. Rep. 386, 20 S.C.R. 591; *Queen* v. *Black,* 6 Ex. Ct. Rep. 236, 29 S.C.R. 693; *Islington Vestry* v. *Hornsey,* [1900] 1 Ch. 695, 705-6; *Yabbicom* v. *King,* [1899] 1 Q.B. 444; *McIntosh* v. *Pontypridd,* 61 L.J.Q.B. 164; *Kerr* v. *Preston Corp.* 6 Ch. D. 463; *College of St. Mary* v. *Atty.-Gen.* 6 H.L.Cas. 189.

A. J. Andrews, K.C., and *T. A. Hunt* for the relators, the City of Winnipeg.

J. H. Munson, K.C., in reply cited *Islington Vestry* v. *Hornsey,* [1900] 1 Ch. 695; *Lewin on Trusts,* 1202; *Crook* v. *Seaforth,* L.R. 6 Ch. 551, and *Davenport* v. *The Queen,* 3 A.C. 115.

MATHERS, C.J.K.B. The rule of practice applicable to amendments is well settled. No admissible amendment material to the case of the party applying ought to be refused unless the opposite party cannot be compensated by costs. I say admissible amendment because, if the matter proposed to be pleaded would constitute no ground of action or defence as against the other side, or, where the application is made at the conclusion of the evidence, and the truth of the allegations sought to be introduced is not borne out by the evidence, the application should be refused.

In the present case counsel for the Attorney-General opposes the motion on both grounds above stated. Counsel

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for the City confined his argument chiefly to the point that the evidence proposed in support of the proposed new plea does not prove it.

The action is brought by the Attorney-General by relation of the City of Winnipeg and E. H. Rodgers, the City's building inspector, and by the City of Winnipeg in its own right.

The statement of claim sets up three by-laws passed by the City, one of which forbade the erection of any gas works or gas holders within the City without first obtaining the permission of the City Council; another which prohibits the erection of buildings within the City without a permit being issued therefor by the building inspector, and a third which prescribed an area within the City within which no gas works shall be erected or continued.

It further alleges that the defendants have started to erect and are erecting gas works within the City without having any legal right or power to do so, without having first obtained the permission of the City Council, without a permit and within the prohibited area, thus contravening the provisions of all the by-laws.

The defendants deny the validity of the several by-laws relied upon by the plaintiffs. They also claim that, by virtue of the powers derived from the Manitoba Electric and Gas Light Company, they are not subject to these by-laws. They also set up numerous facts and circumstances for the purpose of showing that the plaintiffs are estopped in fact from denying that the defendants have these powers.

In addition to this they desire by amendment to set up that the question of their having these powers is *res judicata* because of the judgment of the Privy Council in a former action which the City of Winnipeg alone brought against the defendants for, amongst other relief, a declaration (1) that the defendants had no right to use

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any electric power for the operation of their street railway in the City except what is developed within the limits of the City; (2) that the defendants had no right to erect poles or wires on the streets, lanes or highways of the City for the purpose of transmitting electric power developed outside the City, and (3) that the defendants might be bound to forthwith remove the poles and wires erected by them and restrained from erecting others for such purpose.

The defendants in that action by their defence alleged a transfer to themselves of all the franchises, rights, powers, assets and plant of The Manitoba Electric and Gas Light Company in 1898, and that they had since continued to exercise the rights and franchises so transferred with the consent and approval of the City.

By the final judgment of the Privy Council the City's claim was dismissed upon all points.

Before a matter can be considered *res judicata* it must have been determined by the judgment of a Court of competent jurisdiction. Like most other rules of law the chief difficulty does not consist in its statement, but in its application. In this case the central difficulty is in ascertaining whether or not any particular question has been determined by the judgment.

The cases are not altogether clear or consistent as to what may be looked at for the purpose of solving this question.

I do not propose on this application to go into the question of what may or may not be evidence in support of a plea which on its face appears to be sufficient in law. The defendants' counsel produced a bulky printed volume of the proceedings before the Privy Council which he says contains evidence to prove the proposed plea. The plaintiffs' counsel deny that it contains such evidence. I do not feel called upon at this stage to critically examine this evidence. As against the City of

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Winnipeg, which was a party to the other action, I will allow the amendment and give the defendants an opportunity of proving it if they can.

The position of the Attorney-General is entirely different. He was not a party to the former action, and if in this suit he has any independent right he is not bound by the proceedings in the former action. The fact that he sues at the relation of the City makes not a particle of difference. He represents the Crown and the Crown alone, and could have sued without a relator as well as with one. In that case costs might be given against the Attorney-General, Rule 284. When the Attorney-General sues by a relator the practice is to give costs against the relator and not against the Attorney-General. It would seem that the object in having a relator is for the protection of the Crown against costs and not for the protection of the defendant. The practice in such cases is lucidly stated by Vaughan-Williams, L.J., in *Attorney-General* v. *Logan*, [1891] 2 Q.B. 100. He there says:

"As I understand the practice when the Attorney-General proceeds at the relation of a private person or a corporation he takes the proceeding as representing the Crown, and the Crown through the Attorney-General is really a party to the litigation. It is quite true that, when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as relator and to make him responsible for the costs, but I do not think that this practice in any sense makes the relator a party to the proceedings, although he is responsible for the costs, any more than (to take a converse case) an infant who brings an action is responsible for the costs of it. If I am right it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant but of the Crown."

In *Attorney-General* v. *Cockermouth*, L.R. 18 Eq., at 176, Jessel, M.R., said: "Except for the purposes of costs there is no difference between an *ex-officio* informa-

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tion and an information at the relation of a private individual. In both cases the Sovereign as *parens patriæ* sues by the Attorney-General."

The action is to restrain the breach of City by-laws by the defendants, and for the abatement of what is alleged to be a public nuisance. These by-laws have within the territorial limits of the City the same effect as an Act of Parliament has upon the subjects at large: per Lord Abinger, C.B., in *Hopkins* v. *Swansea,* 4 M. & W. at 640; *Dillon on Municipal Corporations,* par. 573; *Biggar's Municipal Manual,* 327, and per Day, J., in *Yabbicom* v. *King,* [1899] 1 Q.B. at 448.

That, in such a case as this, the only party who can sue for the protection of the public right is the Attorney-General is sufficiently shown from such cases as *Devonport* v. *Tozer,* [1903] 1 Ch. 759; *Attorney-General* v. *Wimbledon,* [1904] 2 Ch. 34, and *Attorney-General* v. *Pontypridd,* [1898] 1 Ch. 388. The right of the Attorney-General to take action on behalf of the public could not be taken away by the City consenting to the erection of this gas holder by the defendants in breach of its own by-laws: *Yabbicom* v. *King,* [1899] 1 Q.B. 444.

Mr. Munson for the defendants relied principally upon two cases as showing that the Attorney-General is estopped by the former judgment, both of which I think are quite distinguishable. The first case relied upon is *College of St. Marys Magdelen* v. *Attorney-General,* 6 H.L.C. 187. That was not a case of *res judicata.* It was a case of the Statute of Limitations, but the principle is probably the same. The facts were these: Lands were given for the benefit of the poor of two parishes and placed under the control of the rectors and church wardens, who, with the consent of the vestries, might lease them. They executed a lease of them forever to a college. About 60 years after the Attorney-General filed an information to cancel the lease. The Court held that,

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as the real plaintiffs were the poor of the two parishes, they were in the situation of a *cestui que trust;* that, as the Attorney-General had no independent right, it was a suit by them; that they could not maintain such suit, unless against their trustees, except within 20 years; that this was not such a suit but against purchasers for value, and was barred.

The Lord Chancellor, at 210, said : "The Attorney-General is only a part of the machinery by which the rights of others are sought to be enforced. He is no more a party claiming a right than in an ordinary action at law the attorney on the record is such a person. We must look at the real litigants in this case and not at those by whose intervention the rights in dispute are endeavored to be sustained. But here I feel bound to say I differ from the Master of the Rolls. The parties really seeking relief in this suit are the poor of the two parishes of St. Olave and St. John."

Lord Wensleydale, at 214, said he would not inquire whether the Attorney-General was a necessary party, "for if he was it seems to me clear that he is only an instrument to enforce the rights of those who are entitled to the benefit of the charity and stands in the same situation as they do with respect to those rights; and if the claimants on whose behalf he is suing are barred he must also be barred. *He has no independent title of his own;* he must succeed or fail as they are entitled to succeed or fail, and if the Statute of Limitations is a bar to them it is a bar to the Attorney-General."

That is a very different case from the present one. The Attorney-General represented only the private rights of the poor of the two parishes, a vastly different thing from suing for the benefit of the public at large. Those whose interests were affected may have been numerous, but were nevertheless capable of exact ascertainment. There seems no good reason, as suggested by Lord Wensleydale, why some of them as representing themselves and all others entitled could not have sued without the intervention of the Attorney-General at all.

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The other case relied upon is a United States case of *People* v. *Holladay*, 29 Pac. R. 54. The action was by the Attorney-General of the State as representing the people. By an Act of Congress the title of the United States to certain lands known as Lafayette Park was granted to the City and County of San Francisco. In a former action brought by Holladay against the City and County of San Francisco to quiet his title to this same land, the question litigated was whether the lands in question had ever been dedicated to the public use as a park. The judgment was that Holladay was the owner of an undivided nineteen-twentieths interest in the land and his title thereto was quieted as against the City and County. The Attorney-General afterwards instituted the present action and alleged that the land was lawfully dedicated to the public use as a public square as Lafayette Park and that the defendants, who were plaintiffs in the former action, had erected buildings and fences thereon, thereby obstructing the public use and that such buildings, etc., constituted a nuisance. The defendant pleaded that the question of dedication was *res judicata* by the judgment in the former action. The Court held the defence good and that the Attorney-General, although not a party to the former action, was bound by the judgment. That case at first blush appears to be a strong one in the defendants' favor and, although not binding on this Court, is entitled to respect. A consideration of the reasons for the conclusion arrived at will, however, at once show that it proceeded upon a principle of law that has no application in England or Canada. The ground of the judgment was that in such an action the Municipality represented the public in the same way as the Attorney-General does in England and Canada. That this was the ground of the decision the following quotation from the reasons for judgment will show: "The City and County of San Francisco is a Municipal Corporation created by the Legislature of the State and has

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conferred upon it by the State full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued, and this necessarily includes the authority to maintain and defend all actions relating to its right to exercise control over and subject to the public use such squares or land claimed by it to have been dedicated for such purposes, and in any action brought by it for the purpose of vindicating and protecting the public rights in such squares or land claimed as such the State would be bound by the result, because in such action the City and County would in fact represent the people of the State by virtue of its authority to maintain such actions for the purpose of preserving the public rights of which it is the trustee. A municipal corporation is for many purposes but a department of the State organized for the more convenient administration of certain powers belonging to the State (cites cases), and such corporations in their management and control over streets and squares within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the State."

Cases are then cited wherein it was held that a City has the same right to maintain an action to prevent an unlawful obstruction of the streets as the people of the State; that the State has the same power as the Crown in England over streets, highways and public grounds, that the State has vested cities, etc., with control over highways and streets, and they are invested with the authority of the Crown and the State in this respect to file bills to prevent and remove obstructions; that the Municipality so far represents the equitable rights of the inhabitants that it may maintain actions to abate public nuisances upon a public square, and then proceeds: "We entertain no doubt that the City and County of San Francisco has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares or land claimed as such within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement

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and that the State itself is bound by the result of such litigation if the same is not collusive."

The short ground of the decision was that the City in California for the purpose of the action represented the people not only of the City but of the State. A municipality in Canada has no such representative capacity, so that the *People* v. *Holladay,* even if binding, is for that reason distinguishable.

In *Attorney-General* v. *Fonseca,* 5 M.R. 173, 17 S.C.R. 612, there is a dictum of Gwynne, J., at 619, that the Government of Canada would be bound by the judgment in a previous action to which the Attorney-General was a party. In the present case the Attorney-General was not a party to the former action, so that that case need not be further noticed.

For these reasons I am of opinion that the Attorney-General is not estopped by the judgment in the former action and that as against him the application to amend should be refused.

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FOX V. SELKIRK LAND & INVESTMENT CO.

Before METCALFE, J.

Company—By-laws of company—Forfeiture of shares—Notice of forfeiture—Purchaser with notice—Re-sale of shares by company.

Early in 1907 the plaintiff was allotted six shares in the capital stock of the defendant company upon his application and upon making the required initial payment. He made no further payments on his shares and in July, 1911, the directors assumed to cancel the shares without any notice to the plaintiff, disposed of them to other parties and afterwards refused to recognize the plaintiff as a shareholder.

The defendants relied on one of the by-laws of the company which gave the directors "power to summarily forfeit shares and the money paid thereon, upon which any call shall have remained unpaid for six months after it shall be due and payable."

These by-laws had been passed at a shareholders' meeting and it did not appear that they had ever been dealt with by the directors.

Held, that the forfeiture was invalid as, even if the by-laws had been regular, effect should not be given to a forfeiture of which no notice of intention had been previously given.

The defendants contended that, after the sale of the shares to other persons, there was no unissued stock available for the plaintiff, but the purchasers knew they were buying shares which the company claimed were forfeited shares and no certificates had been issued to them.

Held, that these purchasers must be presumed to have had knowledge of all the circumstances and that the plaintiff was entitled to be treated as still holder of the six shares subject to all obligations legally imposed upon him as such shareholder.

DECIDED: 10th December, 1912.

Statement

THE plaintiff sued the defendant corporation alleging that he became on the 31st December, 1906, a shareholder for 4 shares, and on the 11th February, 1907, a shareholder for 2 shares of the capital stock of the Company; that he paid thereon the sum of $60; that he applied for a statement of the balance owing on his stock, with the expressed intention of paying such balance; that the defendants refused to give any such statement, contending that the said 6 shares were cancelled and that in consequence thereof the plaintiff was not any longer the owner of the shares. The plaintiff stated that he was ready and

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willing to pay whatever moneys might be found to be due. He claimed a declaration that he was still the owner of the 6 shares of the said stock and an order that the defendant Company treat the plaintiff as a shareholder.

The defendants, by their pleading, denied that the plaintiff ever was a shareholder, or that any stock was ever allotted or issued to him. As an alternative they claimed that if the plaintiff ever applied for stock, and if the application were accepted, such acceptance was conditional upon the terms set forth in the said application; that such conditions were not complied with by the plaintiff; that the acceptance never became absolute; that the plaintiff abandoned his said application, and his right thereby became at an end.

As a further alternative the defendants set up default of the plaintiff in respect of payment of calls, and claimed that the same were summarily forfeited, together with the moneys paid thereon to the Company and that the plaintiff's right had lapsed and determined.

The defendants further claimed that all the stock of the company had been issued and there was no further stock which the Company might lawfully allot to the plaintiff.

In reply the plaintiff, amongst other things, set up that the Company accepted his applications and allotted the stock; that if they made any call it was invalid, and that any forfeiture was invalid. He further claimed that if it should appear that these 6 shares had been sold to innocent purchasers subsequent to the forfeiture, and that there were not any longer any shares, then in the alternative, but not otherwise, he claimed:—

(*a*) The return with interest of the moneys paid.

(*b*) Damages to be assessed upon a reference to the Master.

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Argument.

F. Heap and *R. D. Stratton* for plaintiff cited *In re Wade,* 2 Alta. 117; *Newman* v. *Ginty,* 29 U.C.C.P. 34; *Hill's Case,* 10 O.L.R. 501; *Ex parte Barrett,* 2 Dr. & Sm. 415; *In re Leeds Banking Company,* L.R. 1 Eq. 225; *Oakes* v. *Turquand,* L.R. 2 H.L. 325; *Hubbersty* v. *Manchester,* 8 B. & S. 420, 423; *Union Fire Ins. Co.* v. *O'Gara,* 4 Ont. R. 359; *Provident Life Ass. Co.* v. *Wilson,* 25 U.C.R. 53; *Clarke* v. *Hart,* 6 H.L.Cas. 633; *Bush's Case,* L.R. 9 Ch. 554; *In re New Chile Gold Mining Co.,* 45 Ch. D. 598; *Croskey* v. *Wales,* 4 Giff. 319; *Alexander* v. *Automatic Telephone Co.,* [1900] 2 Ch. 56; Cyc. Vol. 10, 573, 385, 390, 588, 402; *In re Henderson Roller Bearings, Ltd.,* 11 O.W.R. 526; *In re International Contract Co.,* L.R. 3 Ch. 36; *In re Portuguese Con. Copper Mines,* 45 Ch. D. 16, and *In re Maddever,* 27 Ch. D. 525.

R. M. Dennistoun, K.C., and *H. M. Hannesson* for defendants cited *In re New Chile Gold Mining Co.,* 45 Ch. D. 598; *Sparks* v. *Liverpool,* 13 Ves. 428, and *Evans* v. *Davis,* 27 W.R. 285.

METCALFE, J. It appears that the plaintiff on the 31st December, 1906, made his application in writing as follows:

"Jan. 10/07.

Application for Shares.

I, George Herbert Fox, hereby request the Directors of The Selkirk Land and Investment Company, Limited, to allot to me four shares of the Capital Stock of the Company, and I agree to accept the same or any less number that may be allotted to me.

I have paid with this application the sum of Forty Dollars ($40.00), being 10% of the shares subscribed for, and premium at the rate of $5.00 per share and agree to pay further payments of 15% in 30 days and 25% in 60 days, and the balance as may be called by the Directors.

I hereby appoint the President and Secretary, or either of them in the absence of the other, to act and vote for me at any meeting or meetings of the Company at which I may not be personally present.

Dated this 31 day of Dec. 1906.

(Signed) Geo. H. Fox.

Witness: F. A. Gemmell.

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He paid the $40 and received a receipt therefor as follows:

"Selkirk, December 31, 1906.

"Received from G. H. Fox, of Selkirk, the sum of Forty Dollars, being 10 per cent. payment on Four Shares of the above Company.

Premium.....$20.00

10 per cent. on Shares.....$20.00 F. A. Gemmell, Agent.

$40.00

On January 15th he received a letter from the Secretary of the Company as follows:

"At a meeting of Directors held Jan. 10th, 1907, you were allotted four shares of the Capital Stock of The Selkirk Land & Investment Co., Ltd. You have paid on subscription the sum of $20 and premium and, in accordance with your application, further payments will be payable as follows: $30 in thirty days and $50 in sixty days."

The minutes of a meeting of the directors of the Company on January 10, 1907, are found on page 77 of the Minute Book, the material part being as follows:

"An application from G. H. Fox for 4 shares was presented. Moved by R. Bullock, seconded by Dr. Ross, that 4 shares be allotted to G. H. Fox as applied for. Carried."

Thereupon in the stock ledger of the Company there was entered, in the ordinary way, the name of Geo. H. Fox as a shareholder for 4 shares, for which he was credited with the sum of $20 paid and debited with $200.

Afterwards, on the 11th day of February, 1907, he made a similar application in writing for 2 shares. It is not shown that he received a receipt therefor, but it is shown that he paid the money.

Mr. Fox did not receive any written notice of allotment of these subsequent shares, but he received a verbal notice that such had been allotted and, in any event, there appears an entry of February 12, 1907, in the stock ledger of the Company, showing George H. Fox

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as a shareholder for a further 2 shares, showing a debit of $100 and a credit of $10, and the further entries showing that he is a shareholder in the amount of $300.

The Company appears to have held its first shareholders' meeting on July 2, 1903. At that meeting there were the following resolutions:

"It was moved by R. Bullock, seconded by Dr. Ross, that the draft of the by-laws be read over and discussed. Carried."

"Moved by D. Morrison, seconded by Dr. Ross, that the by-laws as read with amendments be adopted. Carried."

A document is filed, purporting to be the by-laws mentioned. There is no seal nor signature attached to the exhibit; but to it is a certificate as follows:

"We certify this to be a correct copy of the By-laws of The Selkirk Land & Investment Co., Ltd., as passed at a general meeting of the shareholders of the Company held July 2, 1903."

And to that certificate is attached a seal. These by-laws appear never to have been dealt with by the directors.

Clause 19 of the general by-laws is as follows: "19. That the Board shall have power to summarily forfeit shares and the money paid thereon, upon which any call shall have remained unpaid for six months after it shall be due and payable, and such forfeit stock shall thereupon become the property of the Company; interest at the rate of ten per cent. per annum to be paid on arrears."

The plaintiff paid no further sums than the moneys accompanying the applications. He received notice of the meeting of the shareholders down to and including February, 1908, and attended some of the meetings and voted.

At a meeting of the directors, held on the 24th July, 1911, the following resolutions were passed:

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"Moved by J. E. Mailhot, seconded by Dr. Ross, that whereas G. H. Fox has defaulted in the payment of the calls on his stock subscription the stock allotted to him be and is herewith cancelled, in accordance with the provision of the by-laws governing such cases. Carried."

"Moved by J. E. Mailhot, seconded by E. F. Comber, that the applications of F. A. Gemmel, J. E. Mailhot, E. F. Comber and D. Morrison to exchange certificates covering 23, 11, 15 and 11 fully paid shares respectively for certificates representing double those numbers of shares of half paid stock, be accepted and that the old fully paid shares be cancelled and new shares issued with 50 per cent. paid thereon. Carried."

Thereupon the Company caused the stock to be cancelled and entries made in the stock ledger to that effect, after which the Company claims they disposed of such stock amongst other shareholders and that thereafter there was no unissued stock.

Has the plaintiff's stock been forfeited? If not must he rely upon his right to damages?

The purchasing shareholders were aware of the fact that they were purchasing stock which the Company claimed was forfeited. I think they must be held to have had knowledge of all the circumstances. No certificates have as yet been issued to them.

On the argument counsel for the defence very properly admitted that, in view of the evidence, he could no longer contend that the plaintiff had not at one time been a shareholder.

I do not think the forfeiture valid. No notice was given the plaintiff of intended forfeiture. Even had the by-laws been regular, I would hesitate to give effect to a forfeiture of which no notice of intention had been previously given.

In the words of Macdonald, J., in *Bogle* v. *Kootenay Valley &c. Co.*, 5 W.L.R. 140:

"The Company refused to acknowledge him as a shareholder and made efforts to deprive him of his rights and interest in the Company."

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The defendants acted arbitrarily towards the plaintiff, and still continue to refuse to recognize him as a shareholder, contending that they have cancelled his stock.

I find that the plaintiff became a shareholder of six shares of the capital stock of the defendant Company, with ten per cent paid up. He is now entitled to all the benefits of a shareholder to such an extent, subject to all obligations legally imposed upon him as such shareholder.

There will be judgment for the plaintiff accordingly, together with costs.

ALSIP V. MONKMAN.

Before METCALFE, J.

Mechanics' Lien—Assignment of lien—Building contract—Architect's certificate—Right of action—Claims for extras.

The contractor, having made default in carrying out a building contract, turned over the work to a committee of his creditors and assigned to them the moneys then earned and thereafter to be earned, and the owner signed an agreement whereby the committee was to complete the building and take the place of the contractor.

Held, that there was a sufficient assignment to the committee of the contractor's right to a lien under The Mechanics' and Wage Earners' Lien Act.

The contract provided that the final payment should not be due until the contractor should produce evidence that no mechanics' liens other than his own existed in respect of the work. No such evidence was given, but there were in fact no other liens filed and the agreement between the contractor and the creditors, to the owner's knowledge, provided that the creditors would not file liens.

Held, (1) That, under the circumstances, the objection was a technical one and effect should not be given to it.

(2) That, although the final certificate of the architect is, under a contract, a condition precedent to the right of action, it is not essential that the issuing of it should be made known to the owner before the commencement of the action.

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Brown v. *Bannatyne*, (1912) 22 M. R. 260, followed.

(3) When a building contract provides that no claims for extras shall be allowed unless ordered in writing and that the amount to be allowed for them shall be settled by the architect, if the latter has considered and dealt with such claims and settled the amount to be allowed for them in giving his final certificate, the contractor can recover nothing further in respect thereof.

DECIDED: 10th December, 1912.

Statement

THIS suit was brought for the payment of $2,975, which plaintiffs claimed for work done upon a building erected for the defendants and for the enforcement of a mechanic's lien which had been filed in respect of the work.

The defendants set up that the architect who was in charge of the work had never at any time issued a final certificate as provided for in the contract, or, if such certificate had been issued, it was never delivered to the defendants, and that the building was not completed on the date named for completion.

Defendants also filed a counter claim for damages and delay in completion of the building and paid into court $680 as being the amount due in satisfaction of the plaintiffs' claim.

T. R. Ferguson, K.C., and *E. K. Williams* for plaintiffs.

J. B. Coyne and *F. K. Hamilton* for defendant Monkman.

C. H. Locke for defendant Clements, a mortgagee.

METCALFE, J. The plaintiffs, William P. Alsip and John D. Sinclair, claim as assignees of the right to a mechanic's lien of the contractors Gibbons & Harris, for balance due under a contract in writing, made between Ernest Gibbons, as contractor, and the defendant Martha A. Monkman, as owner, whereby it was agreed that the contractor, under the direction and to the satisfaction of James Chisholm & Son, architects, would provide all the materials and perform all the work mentioned in the

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specifications and shown on the drawings and details prepared by the architect, and in accordance therewith, for the excavations, sewer and drains, concrete, stone-work, brick-work, tile-work, carpentering, painting and glazing, electrical work, plastering, iron-work, and bricking in of boiler, and furnish all materials required therefor, being all the work and materials necessary to complete the building for the owner at the corner of Langside and Ellice streets, excepting the plumbing and heating and galvanized iron work and roofing. The drawings and specifications were identified by the signatures of the parties.

The plaintiffs also claim a lien as against Clements, a mortgagee.

Under the contract it was, amongst other things, provided: That alterations might be made only on the written order of the architect, who was to compute the value; the amount so computed to be added to or deducted from the contract price. (See Article III.)

That upon certain specified defaults of the contractor the owner might terminate the contract and employ others to finish the work. (See Article V.)

That the contract would be completed before June 1st, 1909, and, for any delay occasioned solely by the contractor's fault, the contractor was to pay to the owner, as liquidated damages, eight per cent per annum on the total contract price. (See Article VI.)

That, should the contractor be delayed through the fault of the owner, the time for completion might be extended. The duration of such extension was to be certified to by the architect. I think in order to avail himself of this provision the contractor should, under the provisions of the contract and under the circumstances, have made a definite claim therefor. (See Article VII.)

That the owner agreed to provide all materials not included in the contract, so as not to delay the material

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progress of the work, and in the event of unreasonable failure so to do, thereby causing loss to the contractor, that she would reimburse the contractor for such loss, the amount of which was in every case to be fixed and determined by the architect. (See Article VIII.)

That eighty per cent of the value of the work was to be paid on progressive estimates of the architect. (See Article IX.)

It was further provided in Article IX as follows:

"The final payment shall be made within twenty days after the contractor has substantially fulfilled this contract, if the contractor shall have given satisfactory evidence that no mechanic's lien other than his own or liens of which he holds discharges exist in respect of the said works; otherwise the final payment shall be made within two days after the time for filing mechanics' lien has elapsed. The contractor may, if he considers he has completed the works, notify the Architect in writing to that effect, and the Architect shall, within seventy-two hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof, or state in writing in what respects the works are incomplete and his decision *should* be final. If the portion of the said work then remaining incomplete may be then readily completed by the contractor, the same shall be done before he is entitled to ask for his final certificate; but, if, for reasons not within the contractor's control, he cannot then complete the same, the architect shall forthwith deduct the actual value of the incomplete portions, together with fifty per cent. thereon (of the propriety of which deduction and the amount thereof the architect shall be the judge) from the contract price and issue a final certificate that the works are completed and the last payment due and indicating the amount thereof. Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractor within the meaning hereof." . . "All payments shall be made only upon the written certificates of the architect to the effect that such payments are due unless the architect is in default in issuing the same."

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Article XII of the contract is as follows:

"In the event of Dallaire, Charette and Daoust withdrawing from contract to do the plumbing, heating and galvanized iron work and roofing, as required by said plans and specifications, at the contract price of $2715, the contractor will perform the said plumbing, heating and galvanized iron work and roofing at the same price and the said price shall be deemed added to the contract price mentioned in Article IX."

The printed form of contract used contained originally the provisions for arbitration usually found in such contracts. These provisions were struck out and the contract as executed contains no provisions for arbitration.

In the fall of 1908 Gibbons built the foundation of the building. It would seem that the plumbers had only put in the basement trap and such under-connections as were necessary therefor.

Nothing more was done under the contract until the Spring of 1909, when Harris became partner of Gibbons and thereafter was recognized as such by the architect and the owner.

In the spring of 1909 the architect and the owner told Gibbons & Harris that they did not think the building covered the whole lot. Accordingly a new survey was made and it was found that the measurements originally intended did not cover the whole lot. The building was subsequently enlarged by a few inches. Apparently the side walls of the basement were not changed, but some front pier-work had to be taken down and rebuilt, and thereafter the building was built a few inches larger than called for by the specifications. There were some other alterations, and some additions, none of which were authorized by the owner or architect in writing.

After the survey Gibbons & Harris went on with the brickwork. The owner was supplying the steel. There was some delay in the steel arriving and Gibbons & Harris, who were contractors in a large way, removed

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their men from this contract, but never notified the architect or owner in writing that they would claim damage by reason of such delay, although the owner in a letter of July 14th, 1909, by her agent A. Monkman, wrote: "You intimated you had a claim and would furnish it without delay to the architect; he tells me you have not done so. I want to get my account with the Western Iron people adjusted without delay and would like you to present your claim if you have one, so that the architects may consider same and report."

At this time Gibbons & Harris knew that the contractors who furnished the iron had really caused the delay and that the owner might have a claim over against them for breach of contract, yet they replied to the letter of the 14th by theirs of July 16th, making no reference to their claims for delay.

On the 28th of August the architect wrote to Gibbons, saying: "I am instructed by Mr. A. Monkman, agent for M. A. Monkman, to notify you that on the expiration of three days, as per terms of contract, that he will proceed to complete your contract for completing the building for him on the corner of Ellice and Langside Streets, and charge the cost of same to you."

On October 1, 1909, the architect wrote to the owner as follows: "After repeated and continued efforts the past two or three months with the contractor, Mr. E. Gibbons, who is erecting the block on the corner of Ellice and Langside, under contract with you as agent for the same, to get the said work completed, I find from the spasmodic efforts, and delays, that, should you wish the building rushed on to completion, there is apparently no other course to be pursued but to proceed under clause, or article, 5 of the contract, and complete the work, retaining any moneys due or accruing to the said contractor and applying it on the completing of the building."

And on the same day, A. Monkman, as agent for the owner, wrote to Gibbons as follows: "The architect of the building on corner of Ellice and Langside, covered

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by contract between you and myself, having certified that you have made repeated and continuous default in proceeding with the contract, and being duly notified under Article 5 have still unreasonably defaulted and delayed furnishing materials and proceeding with the work, and that such refusal, neglect and delay is sufficient ground for terminating such contract.

"I hereby give you notice that such contract is terminated and that I intend to proceed under its terms to complete the work and demand possession forthwith."

On the 2nd of October, Ferguson & Richardson, solicitors for the contractors, wrote to A. Monkman, the agent of the owner, as follows:

"Your letter of Oct. 1st to Mr. Ernest Gibbons, contractor, has been handed to us with the request that we reply thereto.

"Mr. Gibbons has men working on the contract referred to in your letter and has continuously and properly carried on the contract, and, if there have been any delays, it has been through your or the owner's default and neglect and not through any fault of Mr. Gibbons, and he declines to be dismissed from the contract or to give it up. It is his intention to proceed and properly carry out the contract to completion, and he denies your right, as set out in the letter, to dismiss him.

"If you persist in this, we are instructed to take an action for damages against you. Please let us know what you propose to do by return mail."

About this time Gibbons & Harris got into trouble with their creditors and were apparently unable to proceed with any of their contracts. After some negotiation with their creditors, The Alsip Brick, Tile & Lumber Co., Ltd., who were then creditors of Gibbons & Harris, entered into an agreement with the owner as follows:

"Winnipeg, Oct. 4th, 1909.

"The undersigned agree that the whole of the works yet to be done on the building mentioned in the contract between Ernest Gibbons, contractor, and Martha A. Monkman, owner, will be fully and finally completed on or before the 25th day of the present month and that that portion of the works required to complete the west

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store in said building will be fully and finally completed on or before the 14th day of the present month. All such work to be done and completed as required by and to the satisfaction of Jas. Chisholm & Son, architects.

"In the event of Gibbons & Harris completing the agreements now verbally agreed upon by them with their creditors within two days, we will take charge of the said building and the work to be done, in the interests of the creditors having furnished materials and done work on said building and of those furnishing materials and doing the work necessary for the completion thereof, and indemnify the owner against any liability for any work or materials as per schedule endorsed hereon in respect of the Gibbons contract beyond her liability under such contract. In the event of said agreement not being signed and delivered within two days, we will take charge of and complete the works for the owner within the time above mentioned on her behalf, the owner agreeing to repay us for material to be supplied and work to be done and completed and ten per cent. of the net value of material supplied and placed and work done on and from this date for superintendence and that from the present time a competent man shall be put in charge and the said works proceeded with with all possible dispatch. It is understood that the employment of the contractor is terminated and is only to be re-instated when the agreement above referred to with the creditors has been duly executed by Gibbons & Harris and delivered. The owner, Mrs. Martha A. Monkman, agrees that, in the event of the contract being finished by or through Gibbons & Harris, that the entire balance, including extras, if any, payable to them in respect of the said contract, will, upon the written order of Gibbons & Harris, be paid to W. P. Alsip and John D. Sinclair as the committee representing the creditors of Gibbons & Harris, after deducting any moneys the owners may be justly qualified to deduct for damages or delay and for liens for materials or wages, the intention being that she will pay the same amount as if Gibbons had duly completed his contract and as provided in such contract.

Alsip Brick, Tile & Lumber Co., Ltd.

Witness: per W. P. Alsip, Vice-Prest.

A. Monkman. M. A. Monkman.

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Schedule referred to in within contract.

Liability assumed; those undertaken by owner for wages to Morley & Son for swing scaffold, W. G. F. Stephens for paints, etc., to Rat Portage Lumber Co. and Consolidated Plate Glass Co. for materials and Menzies & McIntyre Co. for stone to be delivered since Sept. 29th, '09.

A. B., T. & L. Co., Ltd.,

Witness: per W. P. Alsip, Vice-Prest.

A. Monkman. M. A. Monkman.

Gibbons & Harris did complete the agreement with their creditors and it was duly executed and delivered. By virtue of this agreement, bearing date October 5th, 1909, the creditors:

(*a*) agreed with Gibbons & Harris to assist them in carrying out various building contracts, including the contract with the defendant Monkman;

(*b*) waived their right of lien;

(*c*) agreed to supply such material as was necessary to complete;

(*d*) agreed to allow from proceeds sums sufficient to pay the workmen, and

(*e*) appointed Alsip and Sinclair as a committee to represent them.

By a further provision Gibbons & Harris, for the purposes of the agreement, assigned, transferred and set over unto the said committee all their right, title and interest in all the moneys then earned or thereafter to be earned by them in respect of the said building contracts.

The work afterwards progressed with Gibbons & Harris in charge, but subject to the supervision of Alsip and Sinclair. All payments were afterwards made by Monkman to the committee upon the written order of Gibbons & Harris.

The owner occupied the building before completion.

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Statement

METCALFE, J.

After many interviews between Sinclair and Monkman and letters, the architect, in March, 1910, indicated some work yet to be done and such work was done on or about the 28th March, 1910. I think that the building was then substantially completed.

It is objected by the defendants that the plaintiffs have no assignment in writing of the right to a mechanics' lien. I think it was clearly the intention of the parties that the committee should guarantee the fulfilment of the original contract and for that purpose that they should stand in the shoes of the original contractors Gibbons & Harris. While the agreement of October 5, 1909, does not in terms assign the right to a mechanics' lien, it does assign all the moneys then earned or thereafter to be earned. I think it was clearly intended that the committee should have all the rights of the contractors under the contract. I think the intention of the parties may be looked at, and that the assignment, under the circumstances, is sufficient to entitle the committee to a lien.

The defendants further object, on various grounds, that the action is premature. It is true the plaintiffs have not shown that they produced any evidence that there were no mechanics' liens filed other than their own. No such liens were in fact filed. The agreement with the creditors, to the knowledge of Monkman, provided that the creditors would not file liens. As was said by Mathers, C.J.K.B., in *Brown* v. *Bannatyne,* 22 M.R. 260, this defence at best is technical, and, under the circumstances, I will not give it effect.

The architect, on the 4th day of June, 1910, gave the plaintiffs his final certificate. This fact was not communicated to the defendants until after action was commenced. For that reason the defendants urge there was in reality no certificate. I think the defendants' contention cannot be upheld. See *Brown* v. *Bannatyne, supra.*

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There has been a great deal of evidence and much discussion concerning extras. Unless the owner waived the provision as to writing, or unless the plaintiffs prove a new contract, they cannot recover for such work. But in any event I think the contract provides that the value of such items must be settled by the architect. He has given his certificate and dealt with extras. Gibbons & Harris made the contract with their eyes open. I see no real hardship in the contract. It is not to be expected that the owner should be familiar with all the details and specifications of a building. Neither is it to be expected that he desires to get into a legal tangle over disputes concerning matters of which he knows nothing. Where, therefore, he says that these are matters which must be left to the architect, the contractor may take such a contract at the price, or he may leave it. The name of the architect is specified. He knows the architect. He must take his chances. If, under these circumstances, he makes the contract, I think he is bound by the findings of the architect. The architect has here certified not only as to the extras, but as to their value. The subsequent negotiations and agreement with the creditors contemplates that, in the event of the creditors taking over the works, they shall continue the contracts as they stood and to the satisfaction of the architect in charge. I do not think the subsequent dealings amount to a waiver as claimed by the plaintiffs. So long as the certificate stands, I think it is a bar to the plaintiffs' recovery for extras.

The owner says she has a counterclaim against the amount found to be due by the architect. This she deducts and pays the balance into court. I think she has a claim against the contractor by reason of his breach regarding the plumbing contract, and it may be for the item of heating. There will be a reference to ascertain the amount for which the owner should receive credit.

There will be a verdict for the defendant Clements with costs.

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REX *ex rel.* SOVEREEN v. EDWARDS.

Before CURRAN, J.

Local option by-law—Petition for repeal of—Liquor License Act, R. S. M. 1902, *c.* 101, *ss.* 74, 74A, 74B—*Signatures of petitioners—Aliens—Misnomer—Misrepresentation—Fraud—Affidavit—Duty of council of municipality on receipt of petition—Burden of proof—Mandamus.*

This was an application for a *mandamus* to compel the Council of the Rural Municipality of Swan River to submit a by-law to the electors for the repeal of a local option by-law then in force under the provisions of the Liquor License Act, R. S. M. 1902, c. 101.

On objections taken by counsel for defendants to the petition filed with the Council under section 74 of the Act, the following points were decided:

1. The removal of the paper fasteners by which the various sheets of which the petition was composed were originally held together, in order to attach the affidavit of execution required by section 74B added to the Act by section 3 of chapter 35 of 10 Edward VII, the whole having been properly fastened together again, did not invalidate the petition.
2. When the burden of proof is upon the party seeking to show that a person whose name is on the municipal voters' list is not a British subject, it is not sufficient to prove:

(a) That the person had lived in the United States and had not been naturalized in Canada, or

(b) That the person was born in the United States and had never been naturalized in Canada, as his parents might have been British subjects.

3. A mistake in the Christian name of a voter on the list will not be sufficient to warrant the striking of his name off the petition, if it appears by the evidence that the petitioner is really the person intended to be named on the list.
4. It is not misrepresentation or fraud, sufficient to warrant the striking of a petitioner's name from the list, for the person procuring the signature to tell him that the petition was for the purpose of changing the law so that a man could have liquor in his own house without breaking the law; for, under local option, he can, in general, only do so by importing the liquor from some point outside the Province.
5. Even before the enactment of said section 74B the Council, on receipt of such a petition, had no right to look at extrinsic evidence to prove the insufficiency of it, or to weigh the sufficiency of affidavits or to pass upon the credibility or reliability of deponents, and now the right of the Council is limited to an examination of the petition itself and of the affidavit or affidavits of execution.

Re Williams and Brampton (1909), 17 O. L. R. 398, followed.

6. Since neither section 74B nor the form of affidavit provided requires any statement of the date when the petitioners signed, it is not

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incumbent upon the applicant for a *mandamus* to prove affirmatively that the petition had been signed within the calendar year in which it was filed as required by section 74A added by the statute of 10 Edw. VII. 1912

That statute prescribes what evidence is required and the Court should not call for more.

7. The fact that the witness included in his affidavit of execution the names of fourteen voters as resident, when it was shown that they had ceased to be resident because their homes had been taken out of the Rural Municipality and put into the Village Municipality of the same name, did not warrant the conclusion that the witness should not be believed as to the rest of his affidavit, since the Judge was not satisfied that the misstatement was other than a *bona fide* mistake.

DECIDED: 18th December, 1912.

Statement

APPLICATION for a prerogative writ of *mandamus* to compel the Council of the Rural Municipality of Swan River to submit a by-law to the electors of that Municipality for the repeal of a Local Option By-law of that Municipality then in force, and numbered 98, under the provisions of The Liquor License Act, c. 101, R.S.M. 1902.

F. M. Burbidge for applicants.

J. B. Hugg contra.

CURRAN, J. The legal right to have the repealing by-law submitted to the electors is based primarily upon section 74 of the Liquor License Act, which reads as follows:

"After a by-law has been passed under the thirteen last preceding sections of this Act, the Council of any such municipality, if a petition of twenty-five per cent. in number of the resident electors, whose names appear on the last revised municipal voters' list, asking them to do so, is received by the clerk not later than the 1st day of October in any year, shall submit a by-law to repeal such by-law, and it shall be the duty of such Council at its first regular meeting after the receipt of such petition by the clerk, or at a special meeting to be called by the clerk, if necessary, to pass the first and second readings of such by-law before the 1st day of November following."

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This section was amended in 1910 by adding the following:

"But no such petition shall be received by the clerk at any time prior to the expiration of two years after the taking of the vote of the electors upon a local option by-law, or on a by-law to repeal a local option by-law, in pursuance of the provisions of this Act."

A further amendment in 1911 provided that all the provisions of sections 62 to 73 inclusive of that Act shall apply to such repealing by-law and to the voting thereon.

In 1910 another important amendment to such section 74 was enacted in the form of sections 74A and 74B, the substance of which sections is as follows:—

74A requires that any petition, either for a local option by-law, or for a repeal of such a by-law, which may be received by the clerk of the municipality, must be signed by all the petitioners within the calendar year in which it is filed with the clerk, and no petition, when filed, or any portion of it, shall afterwards be refiled.

74B requires that a petition for either submission or repeal shall be verified by affidavit or statutory declaration of a witness present when the petition was signed by the persons signing the same, setting forth his name, place of residence and calling, and proving the following facts: (*a*) that he personally saw the petition signed by the persons whose names appear thereon and which are set forth in such affidavit, etc.; (*b*) that the said persons are resident electors of the municipality; (*c*) that he has made a personal examination of the last revised municipal voters' list of the municipality, and (*d*) that, from such examination and his personal knowledge of the petitioners, he can positively state that the names of the petitioners appear in such last revised voters' list.

The Act further provides that every such affidavit, etc., shall be *prima facie* proof before the Council of the muni-

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cipality, and before all Judges, Courts and other bodies and elsewhere, of the facts stated therein. It then goes on to provide a form of affidavit which may be used.

Now the facts are that a petition, praying for the submission of a by-law to the electors of the Rural Municipality of Swan River to repeal Local Option By-law No. 98, was received by the clerk of the municipality on the 28th September, 1912, and brought before the Council at a regular meeting on the 2nd October, 1912. The reeve and all members of the Council were present. The reeve read the petition to the Council and all of the names appearing upon it. A deputation of persons opposed to the submission of the repealing by-law was present and, by leave of the Council, looked over the petition and pointed out certain alleged discrepancies. Certain of the Council also pointed out what were claimed to be objections or irregularities in the petition. I need not go into these matters in particular; suffice it to say that the Council did assume to investigate the number and *bona fides* of the names appearing in both the petition and affidavit, and the question of certain petitioners being non-residents of the municipality. The upshot of the matter was that the Council refused to submit the by-law to the electors, and this application is now made for a *mandamus* to compel the Council to do so.

There can be no doubt that a sufficient request to submit the by-law in question was made to the Council and that there was a definite refusal on the part of the Council to submit such by-law. If the petition complies with the requirements of the statute, the applicants have a legal right to have it given effect to in the manner directed by the statute, and the writ should be granted.

A number of objections were argued by counsel for the defendants, among which were the following:

(1) That the petition presented to the Council was

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not the identical document in its identical form and plight signed by the petitioners.

(2) That there was no evidence accompanying the petition that it had been signed by the petitioners within the calendar year in which it was filed with the clerk.

(3) That the affidavit of the witness Crawford to the petition had been shown to be so grossly untrue that it should be entirely disregarded by the Court, and that a new onus was placed upon the petitioners to verify its contents and the *bona fides* of every single signature appearing upon it.

(4) That fraud was shown to have been perpetrated in the procuring of some nine signatures to the petition.

(5) That three names appearing on the petition are not in the voters' list.

(6) That five names appearing on the petition are the names of aliens; and

(7) Some fourteen names appearing on the petition were non-residents of the municipality at the time they signed the petition, although their names appeared upon the last revised list of electors.

The petition, including the affidavit, is contained in fourteen sheets of paper, with an additional sheet for cover, all fastened together at the top by means of four ordinary brass paper fasteners; the heading is typewritten and occupies one whole page, the first, and extends over upon the second page. Apparently the ten following sheets were left blank for the signatures, and the document was in this plight when it left the hands of the draftsman. The affidavit of the witness was manifestly prepared after the names had been secured to the petition and was afterwards affixed to the petition, together with a new cover, and in doing so it was necessary to release the fasteners which formerly held the separate sheets of the petition together, and insert the affidavit and the cover and re-fasten the whole. The petition bears no

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date. I do not think there is any doubt that the petition, subject to these minor changes, which did not at all affect the actual plight of the document, was the same petition which had actually affixed to it the signatures of the petitioners, and I therefore overrule the first objection.

Before dealing with the other objections, it will be necessary to discuss certain facts which are admitted by both parties. Two hundred and forty-six names appear in the petition, but only two hundred and thirty-eight in the affidavit. The total number of resident electors appearing in the last revised list is nine hundred and four, from which should be deducted fifty-three names of repeaters and fourteen names of persons who are now non-residents, and were such when the petition was signed, thus reducing the total number of names of resident electors to eight hundred and thirty-seven.

The defendants' counsel contends that this number should be further reduced by five, on the ground that five persons appearing in the list of electors are aliens. The names of these persons are William H. H. Garland, William J. McConnell, John McConnell, John Egilson and Arnar Egilson. These parties were all examined as to their nationality and I will deal with them individually.

It does not appear where Garland was born. He had lived in the United States, and had not been naturalized in Canada. His name is on the voters' list. I think it ought to be presumed that the officer of the municipality charged with the duty of compiling a municipal voters' list properly performed that duty, and that he would put no man on the list who did not possess the qualifications required by law, one of which is that the voter must be a British subject. It is for the opponents to the petition to show affirmatively that these men are disqualified by

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reason of being aliens. In Garland's case I hold that they have failed to do this.

Next, as to William J. McConnell. This man would appear to be a British subject, as he swears he was born in Canada, and it has not been shown that he ever divested himself of his British citizenship (if a man can do that) by taking allegiance to any foreign state. I hold that the objection to him fails also.

As to John McConnell, no evidence was submitted to show where he was born or what his nationality was. It appears that before coming to Canada he lived in the United States, and has not been naturalized in Canada. This evidence does not go far enough in my opinion to disqualify him, and I hold that the objection to him also fails.

John Egilson and Arnar Egilson, the remaining two of the five objected to, both say they were born in the United States and have lived in the Swan River Valley for thirteen years, that neither of them has ever been naturalized in Canada, and both swear their names are on the voters' list. I am asked, on this evidence, to disqualify these two men as signatories to the petition. The applicant's counsel argues that this evidence is not sufficient, that it should have been shown, in addition, that the parents of these men were not British subjects, and I think, under the circumstances, that he is right. I should be loth to disqualify these men, who for thirteen years have been actual residents of Swan River, and whose names appear in the voters' list as properly qualified voters, except upon very clear evidence, and the evidence produced does not, in my opinion, justify me in so holding. I therefore overrule the objection as to these two men.

Now, as to the petition itself. Of the two hundred and thirty-eight names verified by the witness Crawford, admittedly fourteen were non-residents and must be

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struck off. The defendants' counsel claims that three more should be struck off on the ground that three persons who signed the petition (viz., S. Josephson, J. Sundbaum and Arnar Egilson) are not in the voters' list; five more on the ground that they were aliens (the parties above referred to), and that nine of the signatures (viz., those of Harry C. Gray, Herbert N. Harvey, Thomas Latimer, Charles Reid, D. A. Thomas, L. D. Edmonds, McIvor, Dowling and L. R. Ostrum) appearing on the petition were procured by misrepresentation and should be struck off.

I will now deal with the three names alleged not to be in the voters' list. If this is a fact these names will of course have to be eliminated. Upon looking at the voters' list I cannot find the names of S. Josephson and J. Sundbaum, and the Municipal Clerk, Armstrong, swears that these names are not to be found in the list. I disallow these names as petitioners.

As to Arnar Egilson, it is by no means certain that he is not the person appearing in the voters' list for polling sub-division No. 8, as No. 792, under the name of E. Egilson. He himself swears that he is, and I find opposite to his name (four names from the bottom of page 4 of the petition), in the column devoted to addresses of signatories, a description of land which tallies with the land appearing in the voters' list opposite the name E. Egilson, No. 792, in the column devoted to property qualifications of voters. Misnomers and misspelled names frequently occur in printed voters' lists and, to prevent such errors from disqualifying a man from voting, the law provides a form of oath for electors which, if taken by a voter, entitles him to vote notwithstanding a misnomer or misspelling of his name, and I think I should here give effect to the man's own oath in this respect rather than the other evidence offered upon this point. I allow the name of Arnar Egilson as one in

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fact appearing upon the list of electors, although under a misnomer.

This brings me to a consideration of the nine names alleged to have been procured to the petition by misrepresentation. This contention opens up a rather uncertain field of investigation. Section 254 of the Liquor License Act deals with this matter, and provides that signatures cannot be withdrawn from a petition except fraud be shown. It is a position sometimes easy to take and ofttimes difficult to refute. I think, apart from a consideration as to whether the facts contained in the affidavits disclose misrepresentation or fraud, there should be some corroborating evidence in addition to these affidavits: *Re North Renfrew,* 8 O.L.R. 359.

The remarks of Garrow, J.A., in that case, at page 365, are, to my mind, pertinent. Have these men come forward of their own volition promptly, after learning the real nature of the petition they had signed, and complained of the fraud alleged to have been practised upon them, and have they asked of their own accord to have their names struck off this petition? If they did, it does not so appear; but their complaints are brought before the Court by others, namely those opposed to the petition, and I think this is significant. Let me analyze each affidavit separately and the reasons given.

H. C. Gray says, in effect, that he signed for the purpose of having the sentiment of the electors ascertained on the question of local option. I can see nothing wrong in this. Surely the taking of a vote on this question by the whole body of the electors was the best way of finding out what this sentiment was.

Harvey, Latimer, Reid, Thomas, Edmonds, McIvor, Dowling and Ostrum all say, in effect, that it was represented to them that the petition was for the purpose of changing the law so that a man could have liquor in his own house without breaking the law. Now, I cannot

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see that the canvasser was very far out if he got signatures to the petition on the strength of such a statement. It is popularly understood, I think, that under local option law the keeping of liquor in one's house is unlawful and it is certainly unlawful to bring liquor into local option territory from any point within the Province. The reasonable deduction, I think, from such a statement as was alleged to have been made, is this: repeal the law, that is the local option law, which stands in the way of your having liquor in your house and the desired result will be attained. I cannot find, even if such representations or statements were made, as are said by these men to have been made to induce them to sign the petition, that these representations or statements were untrue or fraudulently made, and I hold against the defendants with respect to this objection.

Counsel for the applicant argued that the municipal council had no right to go behind the petition and affidavit and investigate as to the *bona fides* of the petitioners and their status. If I followed the decision in the *Brampton case*, 17 O.L.R. 398, which was followed in this Court in *Adams* v. *Woods*, 19 M.R. 285, although on another point, I should hold that a municipal council has no such discretion. See the judgment of Anglin, J., at p. 407:

"The statute confers no discretion upon the council and it cannot escape the duty imposed by erroneously deciding that the petition is in any respect insufficient."

Again at page 408:

"Here the statute gives an unusual effect to a petition presented in compliance with its terms. It operates as a command to the council whose ordinary discretion in dealing with petitions is in this case entirely superseded."

And again at page 409:

"The statute in my view entitles the council to require the assurance and guarantee of authenticity which the

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filing of the actual papers to which the signatures of the electors were affixed by themselves *alone can afford.* The Legislature did not intend that municipal councils should be required in cases such as this to weigh the sufficiency of affidavits, or to pass upon the credibility or reliability of deponents."

And again, Mulock, C.J., on page 406, says:

"The statute does not contemplate the council ascertaining by extrinsic evidence what documents the electors signed, but entitles the council to have filed with the clerk the actual paper containing the very words to which the electors appended their signatures."

The Ontario Act does not contain the provision found in section 74B of our statute, and I think this section still further circumscribes the right of the council to look at extrinsic evidence by providing definitely just what evidence, apart from the petition itself, the council might regard.

I think under the existing law the council is prohibited from any investigation beyond that of ascertaining if the petition and affidavit *ex facie* are in accord with the statutory requirements.

The main objection, taken by the defendants, was that the petition was not shown to have been signed within the calendar year in which it was filed, and they rely upon section 74A, being the amendment of 1910, to support this objection.

It is to be noted that this section is followed by another section which requires that the petition shall be verified by the affidavit or statutory declaration of the witness or witnesses present when the petition, or part, or section of petition was signed by the persons respectively signing the same, setting forth his name, place of residence and calling and *proving the facts* set forth in the sub-clauses following. This is followed by the provision, before referred to,—every such affidavit, etc., shall be *prima facie* proof before the council of the facts therein stated.

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The Court of Appeal in *Re North Cypress,* 18 M.R., at p. 318, held that, where the power to bring into force such an Act (that is the local option clauses of the Liquor License Act) requires certain preliminary steps to be taken, the courts should require a strict performance of them. I think the converse of this is equally true, that the Court will not require further or other proofs of compliance with such preliminary steps than are specifically stated in the statute itself to be requisite.

Here the petitioners have complied with the provisions of section 74B, which is the only section dealing with what proofs of the petition are necessary. If the Legislature had intended that the affidavit of the witness should affirmatively show that the petition had been signed by all of the petitioners within the calendar year in which it is filed with the clerk, it would have been easy to say so and to enumerate this as one of the clauses appended to section 74B. That it has not done so is, to my mind, evidence that it did not intend this statement to form part of the proof of preliminary steps *necessary* to accompany the petition and to seize the council of jurisdiction to deal with it.

I hold that it was not incumbent upon the petitioners to supplement the prescribed statutory proof with the further proof as to the time when the petition was signed. There is no evidence to show that any of the signatures to the petition were not obtained within the calendar year—1912. If such proof had been produced it could be considered by the Court and any signatures obtained outside of the prescribed time would, of course, have to be struck off.

I think I have now dealt with all of the objections taken by the defendants' counsel, except No. 3. As to this the defendants' counsel cited an American case from the State of Oregon, reported in 125 Pac. 303, *The State* v. *Olcott.* Even if I thought the principles laid down in

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this case applicable to our statute, I do not think the two cases are parallel. In the Oregon case wholesale forgery of names to a petition was shown to have occurred, and to have been so widespread as to destroy in the opinion of the court the credibility of the attesting witness. Such a condition of things has not been shown to exist in this case. At most some fourteen names, all of which are *bona fide* and appeared in the voters' list as residents, have been shown to be non-resident. There is some excuse for this error. The names of the rural municipality and of the village municipality are the same. The village municipality was carved out of the rural municipality, and these men, who had formerly been residents in the rural municipality, subsequently, some time in the year 1912, became residents of the village, whether by actual removal or by their homes being included in the newly incorporated area does not appear. I cannot find that the mistake of residence was otherwise than a *bona fide* mistake, and it does not generally impair the reliability of the affidavit attesting the petition.

Upon the whole I have come to the conclusion that the petition was sufficiently signed, and that the petitioners have done all that section 74B of the Liquor License Act required of them, and have established a legal right to have effect given to the petition, and to have the by-law prayed for submitted to the electors.

The order for *mandamus* will go in the terms asked for in the notice of motion, with costs to the applicant. The notice of motion asks for costs, and the defendants have advisedly opposed the application and put the applicant to considerable expense, and I see no reason why he should be deprived of his costs.

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MOYER V. JONES.

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Before MACDONALD, J.

Jury trial—Application for order for, after defendant has given notice of trial before a Judge—King's Bench Act, ss. 59, 60—Jurisdiction of Referee.

The defendant cannot, by giving notice of trial before a Judge without a jury, deprive the plaintiff of his right to apply afterwards for, and obtain, an order under sub-section (b) of section 59 of the King's Bench Act for the trial of the action by a jury.

The Referee has jurisdiction to make an order for trial of an action by a jury.

DECIDED: 27th December, 1912.

Statement

APPEAL from an order of the Referee granting a jury and setting aside the notice of trial served by the defendant.

The statement of claim was issued and served on the 31st October, 1912, and a statement of defence filed and served on the 15th November, 1912.

On the 6th December, 1912, the defendant gave notice of trial and set the case down for hearing for the 17th December.

On the 11th December the plaintiff gave notice of motion requiring the issues to be tried by a jury returnable on the 16th December.

The Referee made an order granting a jury and setting aside the notice of trial served and from that order the defendant appealed.

W. H. Trueman for plaintiff.

M. G. Macneil for defendant cited *Ferguson* v. *Eyre*, 20 O.W.R. 873; *Bank of Toronto* v. *Keystone Fire Ins. Co.*, 18 P.R. 113; *Hawke* v. *O'Niell*, 18 P.R. 164, and *Hewitt* v. *Hudson's Bay Co.*, 20 M.R. 20.

MACDONALD, J. It is urged on behalf of the defendant that the Referee had no power to grant the order. That officer has the same power as a Judge of this Court, and if a Judge has the power there is no room to question the power of the Referee.

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The main contention is that the defendant, by serving notice of trial and setting the case down for trial, has fixed the forum and that this cannot be changed excepting under section 60 of the King's Bench Act, which enables a Judge presiding at a trial in his discretion to direct a trial by a jury.

If this contention were correct it would mean that the plaintiff would have to make his application for and succeed in obtaining an order for a jury within the ten days after the filing of the last pleading as, immediately after the expiration of the ten days, the cause being then at issue, the defendant might circumvent the plaintiff by serving him with notice of trial for a non-jury sitting.

The greatest possible expedition in the conduct of this case was shown by the plaintiff, and the haste displayed by the defendant in serving notice of trial would plainly indicate his object being to thwart the plaintiff in obtaining a jury.

The conclusion I have arrived at is that the plaintiff is not precluded by reason of the service of the notice of trial and, upon reading the pleadings and hearing counsel, I think this is a case properly triable by a jury.

I dismiss the appeal with costs.

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APPENDIX.

Memorandum respecting appeals to the Privy Council and the Supreme Court:—

Supreme Court

Huggard v. *Bennetto*, 22 M.R. 44. Affirmed.

Sawyer v. *Mutual Life Ass. Co.*, 22 M. R., 613. Appeal allowed.

Shondra v. *Winnipeg Electric Ry. Co.*, 21 M.R. 622. A new trial was held when a jury returned a verdict for plaintiff for $750. On appeal to the Court of Appeal that verdict was upheld and the Supreme Court affirmed same.

Privy Council

Fraser v. *C.P.R.* 22 M.R. 58. Reversed, 47 S.C.R. 313.

Kelly v. *Enderton*, 22 M.R. 277. Affirmed, [1913] A.C. 191.

Kelly v. *Kelly*, 20 M.R. 579. Judgment of the Court of Appeal reversed and judgment of Macdonald, J., restored, with variations, 23 W.L.R. 953, 3 W.W.R. 799.

Pearson v. *O'Brien* and *O'Brien* v. *Pearson*, 22 M.R. 175. Affirmed, 22 W.L.R. 703, 4 W.W.R. 342.

Appeals to the Supreme Court were entered in the following cases:—

Brandon Gas and Power Co. v. *Brandon Creamery Co.*, 22 M.R. 655.

Lumbers v *Montgomery*, 22 M.R., 735.

Winnipeg Steel Granary and Culvert Co. v. *Canada Ingot Iron Culvert Co.*, 22 M.R. 576.

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A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN

THE COURT OF APPEAL

AND

THE COURT OF KING'S BENCH FOR MANITOBA.

ABANDONMENT.

See VENDOR AND PURCHASER, 4, 6.

ACCELERATION OF TIME FOR PAYMENT.

See VENDOR AND PURCHASER, 3.

ACCEPTANCE OF OFFER.

See CONTRACT, 3.
See VENDOR AND PURCHASER, 1.

ACCIDENT.

See JURY TRIAL, 2.
See NEGLIGENCE, 5.

ACCRUING DEBT.

See GARNISHMENT, 2.

ACTION BROUGHT WITHOUT AUTHORITY.

See PRACTICE, 2.

ACTION FOR ACCOUNT.

See VENDOR AND PURCHASER, 1.

ADMINISTRATION OF ESTATES.

Devolution of Estates Act, R.S. M. 1902, c. 48, s. 21—5 & 6 Edward VII, c. 21, s. 1—Distribution—Parties to action—Suing administrator personally.] — Letters of administration of the estate of M. J. M. were issued to the defendant T. J. M. in April, 1889, the deceased having died in January of the same year.

The estate consisted almost wholly of wild prairie farms and was divisible in the proportions of one-third to the administrator himself and one-sixth to each of four other next of kin.

Held, that the administrator had, in that case, power to sell the lands of the deceased without the approval of the District Registrar or other authority, as he might sell personal property of the deceased for the purpose of distributing the proceeds.

Held, also, that he had no right to distribute the estate by conveying, without their consent, to each of the next of kin an undivided one-sixth interest in the lands, but should exercise his power of selling the lands for distribution.

On the demand of one of the next of kin in an action for administration it is proper to order that the lands be sold for the purpose of distribution.

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This action was originally brought against the defendant as administrator. During the proceedings in the Master's office, the defendant was added as a party in his personal capacity. On appeal to a Judge this order was discharged, but the Court of Appeal decided that, while perhaps this was not necessary, there was no reason why the administrator should not remain a party in his personal capacity.

Lumbers v. *Montgomery*...735

[Appealed to Supreme Court.]

ADMISSION.

See CRIMINAL CONVERSATION.

AFFIDAVIT

Quashing by-law—Existence of probable grounds for quashing—Inquiry before County Court Judge—St. Boniface Charter, 7 & 8 Edw. VII, c. 57, s. 521.]—Section 521 of the St. Boniface Charter, 7 & 8 Edward VII, c. 57, provides that, when an application to quash a by-law of the City Council under section 517 is pending before a Judge of the Court of King's Bench, if it is made to appear to him that probable grounds for the application exist, he may order an inquiry to be held "concerning the said grounds" before the Judge of the County Court of St. Boniface.

Held, that, an affidavit of the applicant based on information and belief may be sufficient to warrant an order for such inquiry. The very reason for the investigation before the County Court Judge is that direct proof of the facts may not be otherwise available, and it should be held sufficient for this purpose that it be made to appear reasonable to suppose that the inquiry will elicit facts bearing upon probable grounds alleged in support of the application.

Re St. Boniface By-law No. 800
.....733

See INJUNCTION.

See LOCAL OPTION BY-LAW.

See WINDING-UP, 2.

AGREEMENT FOR LIEN.

See CONTRACT, 2.

AGREEMENT OF SALE.

See VENDOR AND PURCHASER, 8.

AGREEMENT TO SHARE PROFITS.

See CONTRACT, 1.

ALIENS.

See LOCAL OPTION BY-LAW.

ALIMONY.

Interim alimony—Ability of defendant to pay—Second application for same relief—Offer to resume cohabitation—Cruelty—Desertion—King's Bench Act, Rule 942.]—1. Interim alimony will not be ordered if it appears that the defendant has no ability to pay.

Pherrill v. *Pherrill*, (1903) 6 O.L.R. 642, followed.

2. In fixing the amount which the defendant should be ordered to pay for the plaintiff's disbursements in an action for alimony, no sum for counsel fees should be included unless it appears that the employment of counsel is necessary: King's Bench Act, Rule 942.

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Cowie v. *Cowie*, (1908) 17 O.L.R. 44, followed.

3. The making of an application to the Court for any relief will be no bar to the making of a second application for the same relief, if the first application was merely allowed to lapse and no order was made upon it.

4. If the plaintiff in an alimony action alleges cruelty as well as desertion by the defendant, his offer to resume cohabitation is no answer to the plaintiff's right to interim alimony.

Theakstone v. *Theakstone*, (1905) 10 O.L.R. 386, followed.

Standall v. *Standall*.....591

AMENDMENT.

See ATTORNEY-GENERAL.

See EXECUTORS AND TRUSTEES.

See PRACTICE, 3.

ANIMALS KILLED ON RAILWAYS.

See NEGLIGENCE, 2.

ANNUITY.

See DAMAGES, 1.

APPEAL.

Settlement of action—Finding of fraud—Academic question.]—The defendants were the real estate firm of O. K. & G. and the Real Estate Investment Company, the purchaser of the property, and both appealed from the judgment of Robson, J., *ante*, 159, but, before the hearing in this Court, the Company abandoned its appeal, complied with the terms of the judgment and paid the plaintiff's costs. The Company was not represented on the argument of the appeal of their co-defendants or made a party to it. There was no mention of fraud on the part of any person in the formal judgment, but O. K. & G. sought a reversal of the finding of fraud in the reasons for judgment given by the trial Judge.

Held, that, as the action had been settled as between the parties actually interested in the land, there was nothing left of the litigation but the academic question as to whether the agents had been guilty of any fraud in the transaction and the Court would not hear an appeal upon that.

Wolfson v. *Oldfield* (*No. 2*).170

APPEAL FROM COUNTY COURT.

Consent judgment.]—The plaintiff sued in the County Court for $500 claimed for commission on sale of land. At the trial the verdict entered by the Judge was as follows:

"Leave to plaintiff to add count for work done and service performed. Verdict for plaintiff for $50 without costs, defendant consenting." Plaintiff's counsel was present when this entry was made, made no objection to it, and afterwards entered judgment for the $50.

Held, that the judgment should be considered to have been a consent judgment, and, therefore, one from which there could be no appeal.

Timmons v. *Brown*.....47

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APPEAL FROM JUDGE'S FINDING OF FACT.

See VENDOR AND PURCHASER, 6.

APPEAL FROM TAXATION.

See COSTS, 1, 2, 3.

See SOLICITOR AND CLIENT, 1, 2.

APPEAL TO COURT OF APPEAL.

See ARBITRATION AND AWARD.

ARBITRATION AND AWARD.

Winnipeg Charter, 1 & 2 Edw. VII., c. 77, ss. 818, 823—Making submission a rule of Court—Objection not raised at trial—Order setting aside award but making no further provision—Compensation for property taken—Interest on amount awarded—Appeal to Court of Appeal.]—By-law No. 3649 of the City of Winnipeg provided for the extension of Ida Avenue across and through McNichol's property, and that one-third of the cost of the improvement should be charged against his lands. Pursuant to the by-law and the provisions of the Winnipeg Charter, it was referred to three arbitrators to determine the compensation payable to McNichol for the land taken or injuriously affected by reason of the extension of the street.

McNichol appealed from the award of these arbitrators, which allowed him $6,210, to a Judge of the King's Bench, when an order was made, under section 823 of the Charter, remitting the matter to the consideration and determination of P. A. Macdonald. Afterwards Mr. Macdonald made his award, fixing the compensation payable to McNichol at $5,710, and setting forth the reasoning by which he arrived at that conclusion.

McNichol again appealed, whereupon Metcalfe, J., made an order setting aside Mr. Macdonald's award, but making no provision for determining the matter or referring back the award. McNichol then appealed to this Court from said last mentioned order and asked that the amount awarded to him be increased.

Held, (1) An appeal lay to this Court against the order, notwithstanding the absence of any provision in the Charter for such an appeal.

(2) This Court should not give any effect to the objection of want of jurisdiction in the King's Bench to deal with the award because there had been no order making the submission a rule of Court, such objection, even if valid, not having been raised at the hearing before the Judge.

(3) The order appealed from was wrong in that it simply set aside the award and made no provision for determining the matter or for referring back the award.

(4) The by-law not having been impeached, the referee was right in refusing to allow anything to McNichol in respect of the charge of one-third of the cost of the improvement imposed by it upon McNichol's property.

(5) Upon the merits and having regard to the provisions of section 818 of the Charter and to

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the evidence that had been adduced, the amount that had been awarded by Mr. Macdonald was not shown to be incorrect and his award should be restored and the order appealed from set aside with costs.

(6) Even if the arbitrators had any power, under section 818 of the Charter, to add interest from the date of the by-law, this was not a case in which such power could be properly exercised.

Re McNichol and Winnipeg.. 305

ARCHITECT'S CERTIFICATE.

See BUILDING CONTRACT, 1, 3.
See GARNISHMENT, 2.
See MECHANICS' LIEN.

ASSIGNMENT OF CHOSE IN ACTION.

Building contract—Assignment by contractor without consent or knowledge of proprietor—Priority as between successive assignments—Notice to debtor.]—One Garson entered into a contract in writing with a railway company for the erection of a number of stations. The contract provided that Garson should not assign it or sublet the work or any part of it without the written consent of the engineer. He, nevertheless, shortly after entering into the contract, made an arrangement with the plaintiff to the effect that the latter should construct the stations in his place and that he would turn over to the plaintiff the payments for the work as and when received from the company. The plaintiff then proceeded to do the work and completed it according to the contract. He did not notify the company of the arrangement between him and Garson.

The company's officers knew that the plaintiff was doing the work, but had no reason to suppose that he was not doing it as Garson's manager or agent and gave no consent to any assignment.

While the work was in progress, Garson gave the Imperial Bank an assignment of all his claims against the company for moneys then due or to accrue due to him from the company and the Bank at once gave notice of this assignment to the company. The company thereafter made payments of progressive estimates on the work to the Bank and paid nothing to the plaintiff.

When the Bank took its assignment from Garson, it had no notice of the plaintiff's position, but, from about the time the first estimate was paid, it knew that the plaintiff was doing the work and that Garson from time to time transferred to him the progressive payments, with the understanding that they were to be handed over to the plaintiff.

Held, (1) The agreement between Garson and the plaintiff at most amounted to an equitable assignment of the money to be earned, and the Bank, having acquired priority for its assignment by first giving notice to the company, was not affected by its subsequent knowledge of the plaintiff's position, and was entitled to retain all money received and to receive the balance still unpaid by the company.

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(2) The plaintiff could, under the circumstances, have no claim against the railway company in respect of the work.

Burck v. *Taylor*, (1893) 152 U.S. at 649, and *In re Turcan*, (1888) 40 Ch.D. 5, followed.

Fraser v. *Canadian Pacific Railway Company* 58

Reversed. 47 S.C.R. 313.

See BAILMENT.

ASSIGNMENT OF LIEN.

See MECHANICS' LIEN.

ATTORNEY-GENERAL.

Res judicata — Pleading — Amendment — Municipality — By-laws — Nuisance.] — This action was brought by the Attorney-General as plaintiff, on the relation of the City of Winnipeg, and by the City in its own right, to restrain the defendants from erecting a gas tank on a particular location in the City, and from maintaining the same there as it was alleged to be a public nuisance. The plaintiffs, by their statement of claim, alleged that three by-laws of the City prohibited the erection of the tank. The defendants denied the validity of the by-laws, and set up that, by virtue of the powers derived from another company, they were not subject to the by-laws.

At the trial, the defendants sought to amend their statement of defence by setting up that the question of their having these powers was *res judicata* because of the judgment of the Judicial Committee of the Privy Council in a former action brought by the City corporation alone against the defendants (See 20 M.R. 337, [1912] A.C. 355).

Held, that, as against the City corporation, the amendment should be allowed, and the defendants should have an opportunity of proving the added defence. But

Held, that, as against the Attorney-General, the amendment should not be allowed. He was not a party to the former action; and, if in this suit he had any independent rights, he was not bound by the proceedings in the former action. The fact that he sued at the relation of the City corporation made no difference. He represented the Crown and the Crown alone, and could have sued without a relator, as well as with one. The object in having a relator is for the protection of the Crown against costs—not for the protection of the defendant.

Attorney-General v. *Logan*, [1891] 2 Q.B. 100, followed.

College of St. Mary Magdalen v. *Attorney-General*, (1857) 6 H. L. Cas. 187, and *People* v. *Holladay*, (1892) 29 Pac. Rep. 54, distinguished, the latter on the ground that a municipality in Canada does not represent the people of the Province or the general public.

Held, also, that, in such a case as the present, the only party who can sue for the protection of the public right is the Attorney-General.

Devonport v. *Tozer*, [1903] 1 Ch. 759; *Attorney-General* v. *Wimbledon*, [1904] 2 Ch. 34, and *Attorney-General* v. *Pontypridd*, [1908] 1 Ch. 388, followed.

By-laws of a municipality validly passed have, within its terri-

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torial limits, the same effect as an Act of Parliament has upon the subjects at large.

Hopkins v. *Swansea*, (1839) 4 M. & W. 640, and *Yabbicom* v. *King*, [1899] 1 Q.B. 448, followed.

No admissible amendment material to the case of the party applying should be refused unless the opposite party cannot be compensated by costs.

This rule, of course, does not apply when the matter proposed to be pleaded would constitute no ground of action or defence as against the opposite party or when the application is not made or dealt with until the conclusion of the evidence, and the truth of the allegation sought to be introduced is not shown by the evidence.

Attorney-General v. *Winnipeg Electric Ry. Co*.....761

AUTHORITY TO AGENT.

See VENDOR AND PURCHASER, 1.

BAILMENT.

Possession as evidence of title as against a wrong-doer—Chose in action—Assignability of cause of action for a personal injury—Negligence.]—1. One, who, on a dark night, is driving on the wrong side of a road 24 feet wide and collides with a vehicle going in the opposite direction on the right side of the road, though not proved to have been driving recklessly or furiously, is *prima facie* guilty of negligence, and liable to the person having charge at the time of the other vehicle for any injuries to him or the horse he was driving or to the vehicle and harness.

2. The plaintiff may recover the full amount of the damages caused by the collision, although he is not the owner, but only the bailee on hiring from a livery stable, as possession of the property is sufficient evidence of title as against a wrong-doer. The bailee in such a case must account to the bailor for what he collects above his own interest as money received to the use of the bailor, and the wrong-doer, having once paid full damages to the bailee, has a good answer to any action by the bailor.

The Winkfield, [1902] P. at p. 60; *Glenwood* v. *Phillips*, [1904] A.C. 405, and *Turner* v. *Snider*, (1906) 16 M.R. 79, followed.

3. A cause of action for a personal injury occasioned by negligence is not assignable and an assignee cannot recover upon it.

McGregor v. *Campbell*, (1909) 19 M.R. 38, and *McCormack* v. *Toronto Ry.*, (1907) 13 O.L.R. 656, followed.

Compton v. *Allward*.....92

See NEGLIGENCE, 3.

BANKS AND BANKING.

Bank Act, R.S.C. 1906, c 29.. s. 76, s-s. 2 (c), s. 80—Taking chattel mortgage to secure contemporaneous loan.]—If the manager of a bank, at the time of making a loan, stipulates that the borrower shall give a chattel mortgage to secure the debt, although the mortgage is not executed until three days after the money is advanced and demand notes taken therefor, the transaction should be held to be a colorable one to

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evade the provision in sub-section 2 (c.) of section 76 of the Bank Act, R.S.C. 1906, c. 29, which says that a bank shall not, either directly or indirectly, lend money or make advances upon the security of any goods, wares, or merchandise. Such a mortgage cannot be supported under section 80 of the Act as being one taken by way of additional security for a debt contracted to the bank in the course of its business, and should be declared void and set aside at the suit of the assignee of the mortgagor suing on behalf of the creditors.

Bank of Toronto v. *Perkins*, (1882) 8 S.C.R. 603, followed.

Bates v. *Kirkpatrick*.....672

BARRISTER.

Solicitor—Law Society Act, R.S.M. 1902, c. 95, s. 74—Striking barrister off the rolls—Unprofessional conduct.]—A barrister, although he is not also a solicitor, may be struck off the roll of barristers or otherwise punished for professional misconduct, on a summary application under section 74 of the Law Society Act, R.S.M. 1902, c. 95, even when the work in respect of which the complaint arose was not done in his capacity as a barrister, and was something that might have been lawfully done by a person who is neither a barrister nor a solicitor, provided it is of a kind which is usually entrusted to a solicitor in this Province because of his profession.

Hands v. *Law Society of Upper Canada*, (1889) 16 O.R. 625; *In re Hulm & Lewis*, [1892] 2 Q.B. 261, and *Re Hurst & Middleton*, (1912) 56 Sol. Jour. 520, followed.

In re J. B., an Attorney, (1889) 6 M.R. 19, distinguished on the ground that the wording of the statute in force when it was decided has been altered.

It appeared that Mr. H. had been employed by his client, a man of no business experience and of but very moderate understanding, to attend to the execution by him of a discharge to the executors of an estate in Scotland on payment of a sum of about £500 coming to the client, and procured the client to sign an agreement by which he, H., should receive one-third of the amount, and that he actually collected and retained $817 for his services.

Held, that this was professional misconduct such as to justify the Court in exercising its summary jurisdiction under the statute.

Judgment of suspension from practising in any Court in this Province for a period of nine months.

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BILLS AND NOTES.

Promissory notes signed in name of a proposed company by defendants as president and manager respectively—Liability of defendants as makers of the notes or for breach of warranty of the existence of the company—Liability of persons signing as agents for others without authority—Bills of Exchange Act, R.S.C., 1906, c. 119, s. 52—Implied warranty of the existence of the principal—Consideration—Forbearance to sue—

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Measure of damages.]—The defendant Fournier and one Laplante, a firm of plumbers, being indebted to the plaintiffs in the sum of about $1,500, it was proposed that the plaintiffs should accept the promissory notes of a company about to be formed by Fournier, the defendant Lavoie and others to be called "The Fournier Company" in discharge of the account against Fournier and Laplante.

The plaintiffs agreed to the proposal and shortly afterwards received the notes sued on which began with the words "we promise to pay" and were signed "The Fournier Co., Ltd., F.X. Lavoie, President, D. Fournier, Manager." The proposed company was not incorporated until about three weeks afterwards, but the plaintiffs, at the time they received the notes, did not know that the incorporation had not yet taken place. If there was not an actual release of Laplante and Fournier's original debt, there was at least a request for forbearance in consideration of the notes being given and forbearance in fact was granted.

Held, that these facts showed a sufficient consideration for the notes.

Crears v. *Hunter*, 19 Q.B.D. 341, followed.

Held, also, that, under section 52 of the Bills of Exchange Act, R.S.C. 1906, c. 119, as there was no such company in existence when the notes were signed, they were not within that class in which personal liability is excluded by words indicating that the maker is merely signing in a representative capacity or as agent, and must be held to be the promissory notes of the defendants Lavoie and Fournier, in view of the principle of construction provided for in subsection 2 of that section and *ut res magis valeat quam pereat.*

Kelner v. *Baxter*, (1866) L.R. 2 C.P. 174, and *Thomson* v. *Feeley*, (1877) 41 U.C.R. at p. 234, followed.

Chapman v. *Smethurst*, [1909] 1 K.B. 927, distinguished.

Held, also, that the defendants might be held liable for a breach of the implied warranty of the existence of the company and of their right to make the notes on its behalf.

Per RICHARDS, J.A.—The proper measure of damages for such breach would be the amount of the notes and interest.

Parol evidence may be given to show that the parties actually signing a promissory note were not acting for any principal or as agents. This proof is involved in the evidence of the making of the note.

The law is clear that he who signs a note is liable unless, by appropriate words in it, he exonerates himself from liability, and extrinsic evidence cannot be given to show in what capacity the maker intended to sign.

Leadbitter v. *Farrow*, (1816) 5 M. & S. 349, and *Kew* v. *Pettet* (1834) 1 Ad. & E. 196, followed.

Crane v. *Lavoie*.....330

See INJUNCTION.

BREACH OF CONTRACT.

See CONTRACT, 1.

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BUILDING CONTRACT.

1. *Covenant for payment on completion to satisfaction of engineer—Final certificate of engineer—Work not completed.*—The defendants covenanted with the plaintiffs that, if the work the plaintiffs were to do should be duly and properly executed and completed to the satisfaction of the engineer, the defendants would pay the plaintiffs the amount provided for in the contract, which was for the construction of a dam across the Assiniboine River "with sheet piling so as to constitute a water tight plane." The contract further provided as follows: "So soon as the contractor shall have completely fulfilled the contract requirements, the engineer shall forthwith so certify in writing to the parties, and thereupon it shall be deemed that the purchaser (defendants) have taken over the work."

According to the evidence the plaintiffs failed to construct the dam so as to make it water tight. They relied, however, upon a certificate given by the engineer setting forth the full amount of the contract price with debits and credits as if all the work had been performed, but concluding with the expression, "Retained pending repairs, $500," and concluding as follows: "We hereby certify that the above statement amounting to $6,607.66 is correct and has not been previously certified." It was not stated in the certificate that the work had been duly performed, fully executed or completed; or that it had been done to the satisfaction of the engineer.

Held, 1. The engineer had no power to give such final certificate at the time he did, as the contractor had not completely fulfilled the contract requirements as the certificate itself showed.

Davidson v. *Francis*, (1902) 14 M.R. 141, and *Canty* v. *Clark*, (1879) 44 U.C.R. 222, followed.

2. The plaintiffs, not having fully completed the work, could recover nothing in this action.

Brydon v. *Lutes*, (1891) 9 M.R. at pp. 471-472, followed.

3. In this action, which was to recover the balance unpaid of the whole contract price, the plaintiffs could not recover in respect of the balance remaining unpaid of the progress estimates issued from time to time by the engineers.

Tharsis v. *McElroy*, (1878) 3 A.C., per Lord Cairns at 1045, followed.

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2. *Completion—Fire—Payment in instalments.*]—Under a contract for specified work and materials to be done and provided on a building for a specified sum payable 80 per cent every two weeks as the work progresses, the balance in 20 days after the work is completed, the contractor can recover 80 per cent of the value of the work done and materials provided up to the end of each fortnightly period; but, if the building is destroyed by fire without the default or negligence of the owner before the end of another period of two weeks, and before completion of the contract, the contractor can recover nothing further under the con-

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tract, or as upon a *quantum meruit*.

Appleby v. *Myers*, (1867) L.R. 2 C.P. 660, and *Sherlock* v. *Powell*, (1899) 26 A.R. 407, followed.

Collins Bay v. *New York & Ottawa Ry. Co.*, (1902) 32 S.C.R. 216, distinguished.

Charette-Kirk Co. v. *McKittrick*.....724

3. *Completion of the work—Architect's certificate—Evidence.*]—The plaintiffs' contract with the defendants for the erection of a school building contained the following among other provisions:—

"Art. IX. The contractor may, if he considers he has completed the works, notify the architect in writing to that effect, and the architect shall, within seventy-two hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof, or state in writing in what respects the works are incomplete, and his decision should be final, subject to arbitration as hereinafter provided. If the portion of the said work then remaining incomplete may be then readily completed by the contractor the same shall be done before he is entitled to ask for his final certificate; but if, for reasons not within the contractor's control, he cannot then complete the same, the architect shall forthwith deduct the actual value of the incomplete portions together with fifty per cent thereon (of the propriety of which deduction and the amount thereof the architect shall be the judge subject to arbitration as herein provided) from the contract price and issue a final certificate that the works are completed and the last payment due and indicating the amount thereof. Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractors within the meaning hereof."

At the trial the plaintiffs put in the following certificate of the architect in the form of a letter addressed to the defendant's secretary-treasurer:—

"Dear Sir. The Brown Construction Co., contractors for the Bannatyne Public School, are entitled to the final payment on their contract, deducting $1,200 for work not completed as authorized under Article IX of the contract. I hold waiver of liens from the Brown Construction Co. to protect the Board against liens. I understand that the last certificate amounting to $5,832.25 was not paid, leaving the previous payments at a total of $37,625. This makes the amount due for final payment $11,877.60.

Yours respectfully,

J. N. Semmens."

The following memorandum was written at the bottom of the letter:

Amount of contract..	$48,062.00
Marked cheque.....	2,403.10
Extra No. 1.....	100.00
Extra No. 2.....	125.00
Extra No. 3.....	12.50
Total.....	$50,702.60

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Amount retained.....	$ 1,200.00
Previous payments...	37,625.00
Amount due.....	11,877.60
	$50,702.60

The defendants offered evidence tending to show that the contract had not been substantially fulfilled.

Held, (1) Although the contract called for a certificate of satisfaction or completion as well as for payment, a certificate for payment implied a certificate of satisfaction.

Hudson on Building Contracts, vol. 1, p. 383; 3 *Halsbury*, sec. 429; *Wykoff* v. *Meyers*, (1870) 44 N.Y. 143, and *Clarke* v. *Murray*, (1885) 11 Vic. L.R. 817, followed.

(2) The contract having made the propriety of the deduction of the $1,200 by the architect for uncompleted work and the amount thereof matters concerning which the architect should be sole judge subject to arbitration, it also made his decision final as to both matters, which decision involved a finding that the uncompleted work could not be readily performed at that time, and it was not necessary for the plaintiffs to give evidence to prove that.

(3) It was not necessary that the certificate should contain the particulars of the deductions made.

(4) It was not necessary to give the defendants notice of the plaintiff's application to the architect for his final certificate.

(5) The architect's certificate was therefore final and conclusive under the contract and the evidence tendered by the defendants was not admissible.

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BUILDINGS.

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COMPANY.

1. *By-laws of Company—Forfeiture of shares—Notice of forfeiture—Purchaser with notice—Re-sale of shares by company.*]—Early in 1907 the plaintiff was allotted six shares in the capital stock of the defendant company upon his application and upon making the required initial payment. He made no further payments on his shares and in July, 1911, the directors assumed to cancel the shares without any notice to the plaintiff, disposed of them to other parties and afterwards refused to recognize the plaintiff as a shareholder.

The defendants relied on one of the by-laws of the company which gave the directors "power to summarily forfeit shares and the money paid thereon, upon which any call shall have remained unpaid for six months after it shall be due and payable."

These by-laws had been passed at a shareholders' meeting and it did not appear that they had ever been dealt with by the directors.

Held, that the forfeiture was invalid as, even if the by-laws had been regular, effect should not be given to a forfeiture of which no notice of intention had been previously given.

The defendants contended that, after the sale of the shares to other persons, there was no unissued stock available for the plaintiff, but the purchasers

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knew they were buying shares which the company claimed were forfeited shares and no certificates had been issued to them.

Held, that these purchasers must be presumed to have had knowledge of all the circumstances and that the plaintiff was entitled to be treated as still holder of the six shares subject to all obligations legally imposed upon him as such shareholder.

Fox v. *Selkirk Land & Investment Co*. 773

2. *Use of name of company in action by majority of shareholders —By-laws—Proxies at meetings of shareholders—Election of directors.*]—1. If there is no express provision in the Act of incorporation of a company, or in its by-laws duly passed, preventing it, a shareholder may be represented at a meeting of the shareholders by a person who is not a shareholder as his proxy when the Act gives the right to vote by proxy.

2. When the Act of incorporation of a company gives the directors the power to make by-laws, subject to confirmation at the next general meeting of the shareholders, and says nothing about the shareholders themselves making by-laws, the latter have no power to do so and any by-laws passed by them at a general meeting are void and of no effect.

Kelly v. *Electrical Construction Co.*, (1907) 10 O.W.R. 704, followed.

3. When the Act provides that the election of directors shall be by ballot, it is not competent to the chairman of the meeting to receive nominations and, in the absence of other nominations, to declare the persons nominated to be elected without taking a ballot.

4. When it is shown that a clear majority of the shareholders present or duly represented by proxy were opposed to the election of the persons declared by the chairman to have been elected as directors, the election should be set aside and declared void and a new election ordered.

5. A majority of the shareholders of a company have the right to use the name of the company in an action for a declaration that the persons claiming to have been elected directors were not duly elected and for an order expelling them from that office as usurpers: *Lindley*. 772.

Colonial Assurance Co. v. *Smith*. 441

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CONSTRUCTION OF CONTRACT.

See CONTRACT, 4.

See LIFE INSURANCE, 1.

CONSTRUCTION OF STATUTE.

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CONTRACT.

1. *Agreement to share profits—Breach of contract — Election to treat contract as broken and sue for damages, or to hold to the contract and wait till the time for performance has arrived—Interest in land—Caveat.*]—The plaintiff purchased the land in question in his own name in 1901 and, for valuable consideration, agreed with the defendant, who had brought the land to his attention, that the defendant should have one-half of any profit that might be made on a re-sale of the land. Defendant afterwards produced an intending purchaser at an advanced price, but plaintiff then declined to sell, although he did not repudiate or deny the agreement relied on by defendant. Defendant alleged that he had procured and informed the plaintiff of subsequent offers to purchase the land, each one being an advance over the previous one. This was denied by the plaintiff, but there was no proof that the defendant had at any time abandoned his bargain with the plaintiff.

Held, that the defendant was at liberty to treat the plaintiff's refusal to accept any such offer as a breach of the contract entitling him to damages, or to hold to the bargain and wait till the time for its performance had arrived, and was entitled, under his counterclaim in this action, to a declaration that he had a right to receive one-half of any profits which may be derived from any sale of the land that may be effected either by the plaintiff himself or by the aid of the defendant.

Johnstone v. *Milling*, (1886) 16 Q.B.D., per Bowen, L.J., at p. 473, and *McCowan* v. *McKay*, (1901) 13 M.R. 590, followed.

Held, further, that it could not be said that the defendant had any interest or estate in the land itself in respect of which he might register a caveat under the Real Property Act, and that the plaintiff was entitled to judgment setting aside the caveat so registered by the defendant.

Smith v. *Watson*, (1824) 2 B. & C., per Bayley, J. at p. 407; *Meyer* v. *Sharp*, (1813) 5 Taunt. 74, and *Stuart* v. *Mott*, (1894) 23 S.C.R. 387, followed.

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2. *Sale of machinery—Agreement for lien or charge on land to*

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secure price—Delivery—Waiver—Verbal modification of contract.] —The plaintiffs agreed to sell and the defendant agreed to purchase certain machinery and accessories, and the defendant agreed to give the plaintiffs a lien or charge for the price on certain land. The plaintiffs failed to deliver three of the articles enumerated which formed an important part of the whole outfit, but the delivery of these articles was subsequently waived by the defendant on his receiving an allowance for them satisfactory to him.

Held, that there was not here a substitution of a mere verbal contract for the original written agreement, but only a modification of one part of it, to which modification the defendant was a consenting party, and that the plaintiffs were entitled to judgment for the balance of the original debt and a lien or charge on the lands referred to and a sale of the defendant's interest therein to realize the amount of the debt and costs.

Rustin v. *Fairchild*, (1907) 39 S.C.R. 274, distinguished.

Gaar Scott Co. v. *Mitchell*..474

3. *Consensus ad idem—Option to purchase land—Acceptance of offer with variation—Possession—Real Property Act, R.S.M., 1902, c. 148, s. 132—Caveat—Issue of certificate of title subject to claim of caveator.*]—The defendant Douglas, who lived in Moose Jaw, Saskatchewan, gave at Moose Jaw to the plaintiff, who lived in Winnipeg, an option to purchase within two days the property in question, which was in Winnipeg, for a named price and on certain terms of payment one of which was: "the difference in existing mortgage and and what can be raised in excess of it to be paid to me as soon as new mortgage can be completed, the balance of my equity to be paid in three equal annual instalments with interest at 6% per annum."

The plaintiff returned to Winnipeg and made the cash payment required in time, but did not formally or otherwise accept the offer in the terms in which it was made. After some correspondence, Douglas executed a formal agreement of sale by which the balance of the purchase money was to be payable at Moose Jaw, and sent it to the plaintiff who changed it so as to make the money payable at par in Winnipeg, and then signed it and returned it to Douglas. The latter objected to the change and declared that he withdrew from the sale. He afterwards sold and transferred the property to the defendant O'Brien to whom a certificate of title under The Real Property Act was issued, which was expressed to be subject to the caveat which the plaintiff had registered based upon his said purchase from Douglas.

Held, (1) There was no completed agreement of sale from Douglas to the plaintiff, as the minds of the parties had never met upon all the terms of the proposed sale and Douglas had a right to withdraw from it as he did.

(2) The fact that the plaintiff had obtained possession of the

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property without the knowledge or consent of Douglas and collected the rents would not be such a possession as would take the case out of the Statute of Frauds, even if there had been a complete verbal agreement covering all material points.

(3) The acceptance by O'Brien of the transfer from Douglas and of the certificate of title subject to the plaintiff's caveat had not, under section 132 of the Real Property Act, in any way increased the rights or strengthened the position of the plaintiff under his caveat, or operated so as to prevent O'Brien from asking to have it vacated and discharged as a cloud on his title.

Re Moore and Confederation Life (1893) 9 M.R. 453, explained.

(4) The option itself, even if followed by an acceptance in writing, could not be treated as a complete agreement because it did not say whether the further mortgage contemplated by it was to be made by the vendor or the purchaser and did not state any of the terms of that mortgage or what rate of interest it was to bear.

Per MATHERS, C.J.K.B., in the Court below. The alteration of the agreement by the plaintiff rendered it null and void.

Pearson v. *O'Brien*, *O'Brien* v. *Pearson* 175

[Affirmed by Privy Council, 22 W.L.R. 703, 4 W.W.R. 342.]

4. *Construction of contract—Supply of gas—Implied obligation.*] — After negotiations between the plaintiffs, a gas company, and the defendants who required power to run their creamery, the plaintiffs offered to extend their mains to the defendants' premises and put in service pipes and meters free of charge and to supply "all" artificial gas for power purposes to the defendants for the term of five years at rates specified which varied from $1 per 1000 cubic feet, in case the defendants' consumption should fall below 400,000 cubic feet per month, to 75 cents in case the average consumption per month should reach 500,000 cubic feet for any one year.

Defendants having formally accepted this offer, plaintiffs extended their mains and supplied gas to defendants who continued to take and use it for a time, but then set up their own machinery for making gas and refused any longer to take gas from the plaintiffs or to pay for it.

Held, that the proper construction to be put upon the contract was that, for five years, the plaintiffs agreed to manufacture and supply to the defendants all the gas which they would use for power purposes in their factory and that the defendants agreed that they would take from the plaintiffs all the gas which they would use for that purpose during that period, and that the plaintiffs were entitled to judgment for the damages sustained by the defendants' breach of the agreement.

The Queen v. *MacLean*, (1884) 8 S. C. R. 210; *Kenney* v. *The Queen*, (1882) 1 Ex. Ct. R. 68, and *Wood* v. *Miners*, (1849) 7 C. B. 905, followed.

Per CAMERON and HAGGART, JJ.A., dissenting.

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There was no express stipulation that the defendants should take from the plaintiffs all the gas they might use for power purposes during the next five years and no such stipulation should be implied. The plaintiffs had made their offer without providing for the contingency that had happened and the defendants, having simply accepted the offer, were free at any time to refuse to take or pay for any more gas from the plaintiffs.

Aspdin v. *Austin*, (1844) 5 Q. B. 684, and *Hamlyn* v. *Wood*, [1891] 2 Q. B. 491, followed.

Brandon Gas and Power Co. v. *Brandon Creamery Co.*..... 665

[Appealed to Supreme Court.]

See DAMAGES, 1.

CONTRIBUTORIES.

See WINDING-UP, 1.

CONTRIBUTION.

See PARTNERSHIP, 1.

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See INFANT, 1.

CONVEYANCE ABSOLUTE IN FORM BUT GIVEN AS SECURITY ONLY.

See REGISTERED JUDGMENT, 3.

CONVICTION FOR MINOR OFFENCE INCLUDED IN OFFENCE CHARGED.

See CRIMINAL LAW, 2.

CORROBORATION.

See FRAUDULENT CONVEYANCE.

COSTS.

1. *Appeal from taxation of costs—King's Bench Act, Rules 684, 968, 969—Unnecessary proceedings.*]—Under rule 684 of the King's Bench Act, an appeal will lie from the taxation of costs between party and party as to items which have been objected to before the taxing officer, although such objections have not been put in writing and carried in before the officer as provided for in Rules 968 and 969.

When the plaintiff's claim is not contested, although at the trial he gets judgment thereon with costs and also on the defendant's counter claim with costs, he should get no costs in respect of his claim other or greater than if he had signed judgment upon it when he might have taken that course.

Cooney v. *Jickling*.....468

2. *Taxation of costs—Court of Appeal—7 & 8 Edward VII, c. 12, s. 2—Meaning of the expression "successful party" in an appeal.*]—The limitation of the sum of $100, exclusive of disbursements, which, by section 2 of chapter 12 of 7 & 8 Edw. VII, may be "taxed and allowed for costs of appeal * * * to the *successful party* in any appeal to the Court of Appeal," refers to the costs in the Court of Appeal of the ultimately successful party, and applies in a case where a party fails in the Court of Appeal but afterwards procures a decision in the Supreme Court of Canada reversing the judgment of the Court of Appeal and giving him the costs of his appeal to that court.

Williams v. *Box*.....258

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3. *Taxation of costs—Appeal from taxation—King's Bench Act, Rules 684 and 968—Extraordinary circumstances—Inherent power of Court to remedy case of hardship.*] — There is no right of appeal, under Rule 684, or any other Rule of Court, from a taxation of costs between party and party in respect of items which have not been objected to in accordance with Rule 968: *Snowden* v. *Huntingdon*, (1887) 12 P. R. 248; but the Court, under its inherent power over procedure, may grant relief from any manifest hardship to any party due to circumstances for which he is in no way responsible.

The plaintiff's action, which was for the cancellation of an agreement of sale, was dismissed with costs, and the defendant's counterclaim for specific performance of the agreement was allowed with costs. On the taxation the plaintiff was not represented, as his solicitor was seized with a sudden and very grave illness preventing him from attending or instructing any person for him; and the taxing Master allowed defendant two sets of costs of $300 each, besides disbursements including $1524 for a medical witness from Toronto and other witness fees objected to on the appeal.

Held, that, whilst the Court could not review the taxation on the merits, it was proper under the circumstances to make an order vacating the certificate of taxation and giving the plaintiff time to prepare and put in his objections to the taxation under Rule 968.

Caron v. *Bannerman*.....24

See EXECUTORS AND TRUSTEES.
See REGISTERED JUDGMENT, 3.
See SOLICITOR AND CLIENT, 1, 2.
See VENDOR AND PURCHASER, 1, 2, 4.

CRIMINAL CONVERSATION.

Evidence—Marriage—Proof of foreign marriage—Marriage certificate in foreign language—Defendant's admission of the marriage—Marriage Act, 1906, Man. s. 30.]—Action for criminal conversation. To prove the marriage the plaintiff swore at the trial that he had been married to the woman in a Roman Catholic church in Hungary according to the rites of the Roman Catholic Church and had also gone through a marriage ceremony with her in a civil court, and that they had lived together as man and wife for sixteen years and had issue. He also put in letters written by defendant in which he spoke of the woman as the plaintiff's wife. There was also produced what purported to be a certificate in the Hungarian language of the marriage of the parties, according to the evidence of a witness who interpreted it. No translation of it was made nor was the document filed as an exhibit in the Court.

Defendant moved for a nonsuit on the ground that there was not sufficient proof of the marriage.

The trial Judge ruled that the case must go to the jury and the plaintiff got a verdict.

On appeal.

Held, by RICHARDS and PERDUE. JJ.A., that, in such an action, the

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marriage must be proved with the same strictness as in a prosecution for bigamy, and that it was necessary to show what was the marriage law of Hungary and that it had been complied with.

Morris v. *Miller*, (1767) 4 Burr. 2057; *Birt* v. *Barlow*, (1779) 1 Doug. 174, and *Catherwood* v. *Caslon*, (1844) 13 M. & W. 261, followed.

Also that the defendant's admissions of the marriage furnished no proof of the marriage, although, in a bigamy case, the admission of the accused might be evidence of his own former marriage; also that the evidence as to the alleged marriage certificate had been improperly admitted in the absence of proof that it had been extracted from records required to be made by the laws of Hungary and that such certificate would have been evidence in Hungary of the marriage.

Held, by CAMERON and HAGGART, JJ.A., that the plaintiff's sworn testimony, strengthened as it was by the defendant's admissions, was sufficient to prove a marriage *in fact* or an *actual* marriage, which is all that the cases of *Morris* v. *Miller* and *Birt* v. *Barlow*, *supra*, show to be necessary.

Catherwood v. *Caslon*, *supra*, and *Reg.* v. *Smith*, (1857) 14 U.C.R. 565, distinguished.

Rex v. *Naoum*, (1911) 24 O.L.R. 306, followed.

Held, also, per HAGGART, J.A., that section 30 of the Marriage Act, 1906, c. 41 of 5 & 6 Edward VII, (Man.), applies to marriages solemnized anywhere and legalized the marriage in question.

The Court being equally divided, the appeal was dismissed without costs.

Zdrahal v. *Shatney*.....521

CRIMINAL INFORMATION.

Magistrate — Corrupt or improper conduct of magistrate— Trial before magistrate—Private prosecutor.] — A private prosecutor who has laid a criminal charge against any one has a right to be present when a magistrate sits to try the charge, so that, if the accused does not plead guilty, he may adduce evidence to prove the charge, and, if the accused pleads guilty, he may be heard as to any extenuating circumstances put forward by the accused in mitigation of sentence or show circumstances in aggravation of the offence, and it is illegal and highly improper for the magistrate to dispose of a charge of a serious offence by accepting a plea of guilty in his private office in the absence of the prosecutor, before the time fixed for the public hearing of the case, without giving him an opportunity of being present: *Stephen, Hist. of Crim. Law*, vol. 1, pp. 494-5.

Illegal and improper acts committed by a magistrate in the exercise of his judicial function will not of themselves justify the Court in ordering a criminal information to be exhibited against him, but the Court must be satisfied from the evidence that the magistrate had been actuated by some corrupt, dishonest or improper motive in committing such acts.

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Rex v. *Borron*, (1820) 3 B. & Ald. 432; *Reg.* v. *Badger*, (1843) 4 Q. B. 468; *Re Fentiman*, (1834) 2 A. & E. 127, 4 N. & Man. 128, and *Rex* v. *Williams*, (1762) 3 Burr. 1317, referred to.

Merely acting from a mistaken view of the law would not be be sufficient, though there may be much that is reprehensible and suspicious in the conduct of the magistrate: *Re Fentiman, supra.*

Held, also, (CAMERON, J.A., dissenting) that, though the magistrate had in this case acted improperly and illegally, yet, in view of his denial of any corrupt or improper motive and of his affidavit that he did not know that the course he took was illegal, the evidence, set out fully in the report, was not sufficient to show the existence of any corrupt, dishonest or improper motive for acting as he had, and that the rule *nisi* for a criminal information should be discharged, but without costs.

Re McMicken.....693

CRIMINAL LAW.

1. *Criminal Code, s. 778, s-s. 3—Summary trial of indictable offence—Jurisdiction — Consent of prisoner to be tried summarily.*] — It is sufficient to show jurisdiction in the magistrate at the summary trial of an indictable offence if the conviction contains the statement that the prisoner consented to be tried summarily, without setting out on the face of it, or anywhere on the record, the language used by the magistrate in informing the accused of his right to elect as prescribed by sub-section 3 of section 778 of the Criminal Code.

The consent to be tried summarily is the essential element in the jurisdiction and, if that is stated, it should be presumed that it was regularly and properly obtained, in the absence of any evidence to the contrary.

Rex v. *Mali*.....29

2. *Criminal Code, s. 951—Conviction for minor offence included in offence charged—Shooting with intent to murder charged—Conviction for shooting with intent to maim, disfigure or disable or to do some other grievous bodily harm—Judge's charge to jury—Non-direction—New trial.*] —On the trial before a jury of a person charged with shooting with intent to murder, the Judge should, on the request of the counsel for the Crown, charge the jury that, if, in their opinion, the evidence did not warrant a verdict of guilty on that charge, but was sufficient to warrant a verdict of guilty of shooting with intent to main, disfigure or disable, or to do some other grevious bodily harm, they should, under section 951 of the Criminal Code, bring in such latter verdict, for the latter offence is included in the former.

The Court, however, in this case refused to grant a new trial because of the refusal of the trial Judge to give such a direction, on the ground that the evidence was not such as to warrant the granting of a new trial and, moreover, as the accused had been tried once, a second trial on the same facts should not be ordered.

Rex v. *Kerr*.....353

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3. *Habeas corpus—Taking depositions in shorthand—Oath of stenographer — Summary conviction.*]—It is essential to the validity of a summary conviction for an offence against the Criminal Code, when the evidence is taken in shorthand, that the stenographer should first be sworn to take down the depositions truly and faithfully.

The King v. *L'Heureux*, (1908) 14 Can. Cr. Cas. 100, followed.

The Habeas Corpus Act, 31 Car. II, c. 2, applies to summary convictions.

Rex v. *McEwen*, (1908) 17 M.R. 477, distinguished on the ground that it dealt only with a conviction by a police magistrate exercising the extended jurisdiction to try indictable offences summarily.

Rex v. *Johnston*.....426

4. *Pound Breach and rescue—Ultra vires—By-law of municipality—6 & 7 Vic. (Imp.), c. 30—Municipal Act, R.S.M. 1902, c. 116, s. 644.*]—Rescuing animals from a pound keeper while being lawfully conveyed by him to a pound is a criminal offence punishable, under 6 & 7 Vic. (Imp.) c. 30, in a prosecution before two justices of the peace, and the council of a municipality has no power, under section 644 of The Municipal Act, R.S.M. 1902, c. 116, or otherwise, to pass a by-law providing for the punishment of such an offence in a prosecution before one justice of the peace.

The conviction, therefore, of a defendant of such an offence by one justice of the peace under such a by-law should be quashed.

Rex v. *Laughton*.....520

COURT OF APPEAL.

See COSTS, 2.

DAMAGES.

1. *Breach of contract to support for life—Annuity—Lien or charge on land.*]—An agreement by one party to support another during life is an entire continuing contract; and, upon a total breach thereof, the latter may recover at once full and final damages, *i.e.*, not only the expenses of support up to the time of trial, but also the prospective expense during life.

Schell v. *Plumb*, (1874) 55 N.Y. 592; *Amos* v. *Oakley*, (1881) 131 Mass. 413, and *Parker* v. *Russell*, (1882) 133 Mass. 74, followed.

In such a case the plaintiff is not entitled to judgment for payment of an annuity during his life by the defendant.

Although the consideration given for such an agreement was a conveyance of land, the plaintiff is not entitled to a lien or charge on the land for the amount awarded him for damages for the breach of the agreement.

Zdan v. *Hruden*.....387

2. *Damages for injury caused by shock—Neurasthenia following physical and mental shock—Interest.*]—Plaintiff, while travelling on a street car with which one of the defendants' engines collided, was thrown with the car down an embankment. His physical injuries, so far as they could be seen,

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were slight, but the mental shock he received was very serious and a condition of acute neurasthenia and insomnia followed and continued up to the time of the trial, incapacitating him from doing any work and causing great suffering. Negligence on the part of the defendants was admitted.

Held, that the plaintiff was entitled to recover substantial damages in respect of the disease from which he was suffering as the shock which brought it on was both physical and mental.

Victorian Railway Commissioners v. *Coultas*, (1888) 13 A.C. 222; *Geiger* v. *G. T. R.*, (1905) 10 O.L.R. 511, and *Henderson* v. *Canada Atlantic Ry. Co.*, (1898) 25 A.R. 437, distinguished.

Interest on the amount awarded as damages in such a case should not be allowed for the time between the accident and the verdict.

Ham v. *Canadian Northern Ry. Co.*.....480

3. *Unlawful taking of City water without payment and unknown to the City—Settlement of claim on discovery of facts—Fraud — Duress — Undue influence — Omnia præsumuntur contra spoliatorem—Waiver of right to rescind contract—Rescission—Contract — Formal acceptance of settlement by Council of City.*]—The plaintiff company had for years deliberately appropriated water from the defendants' system, without payment and without the knowledge of the defendants, by means of a concealed pipe connected below the City's meter. On defendants discovering the matter and demanding payment for the water of the sum of $13,778, calculated as for the full flow of the pipe during the whole period, but only at the special manufacturers' rate which the company paid for its metered water, the plaintiffs' manager, while contending that they had not used nearly so much water, said that he was anxious to avoid all publicity and would have to pay what was demanded if it was $30,000. The company had not preserved any record of the quantity of the water so taken. The company then made a payment of $1,778 in cash and gave to the defendants twelve promissory notes of $1,000 each, payable at intervals of one month in settlement of the claim. After paying five of these notes, the company brought this action for the cancellation and return of the remaining notes, alleging fraud, duress and undue influence on the part of the defendants in obtaining them and want and failure of consideration therefor.

Held, that, in the absence of evidence on the part of the company to show that the full flow of the pipe had not been used, there was nothing extortionate in the demand made upon the company, and no reason why the settlement made should be set aside as there was neither fraud, duress nor undue influence used in procuring the settlement.

This was a case in which the maxim *omnia præsumuntur contra spoliatorem* was specially applicable.

Lamb v. *Kincaid*, (1907) 38 S.C.R. 516, followed.

Held, also, that the circumstances did not amount to equita-

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ble duress or undue influence so as to bring the case within the principle of *Smith* v. *Cuff*, (1817) 6 M. & S. 160.

If one party makes a claim upon another, in the existence and amount of which he has an honest belief, and the other party agrees to pay it without further investigation, the latter will be bound by his agreement: *Dixon* v. *Evans*, (1872) L.R. 5 H.L. 606. And that is so, even although the claim put forward turned out afterwards to be wholly unfounded.

Callisher v. *Bischoffsheim*, (1870) L.R. 5 Q.B. 449, and *Cook* v. *Wright*, (1861) 1 B. & S. 559, followed.

Held, also, that the plaintiffs, by the voluntary payment of five successive cheques extending over five months, had waived any right to rescind the settlement even if there had been any evidence of fraud or duress.

Doll v. *Howard*, (1897) 11 M.R. 577, and *Ormes* v. *Beadel*, (1860) 2 De G.F. & J. 333, followed.

Held, also, that the settlement arrived at could not be set aside for want of any formal acceptance thereof by the City Council.

Judgment dismissing the plaintiffs' action with costs and allowing the defendants a verdict on their counterclaim for the amount of the unpaid notes without costs.

Brandon Electric Light Co. v. *City of Brandon*.....500

See EXECUTORS AND TRUSTEES.

See MUNICIPALITY, 2.

See VENDOR AND PURCHASER, 9.

DECLARATION OF FORFEITURE.

See VENDOR AND PURCHASER, 4.

DEFECT IN SYSTEM, WORKS AND WAYS.

See NEGLIGENCE, 6.

DELIVERY.

See CONTRACT, 2.

DELIVERY OF POSSESSION.

See GIFT.

See SALE OF GOODS.

DEPOSITIONS, SHORTHAND.

See CRIMINAL LAW, 3.

DRAINAGE.

See MUNICIPALITY, 2.

DURESS.

See DAMAGES, 3.

ELECTION OF REMEDY.

See CONTRACT, 1.

ELECTION PETITION.

1. *Dominion Controverted Elections Act, ss. 19, 87—Preliminary objections—Time for filing—Application to enlarge time after lapse of time fixed by statute—Practice.*] —1. The filing of preliminary objections to an election petition under the Dominion Controverted Elections Act is only an interlocutory proceeding as distinguished from the filing of the petition itself and the bringing on of the trial; and, if the objections are not filed within the five

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days allowed by section 19 of the Act, the time for filing may be extended under section 87, although the application is not made until after the lapse of the five days.

Alexander v. *McAllister*, (1896) 34 N.B.R. 163; *Re Bothwell Election*, (1882) 9 P.R. 485; *Re Burrard Election*, (1896) 32 C.L.J. 638; *Wheeler* v. *Gibbs*, (1879) 3 S.C.R. 374, and *Stratton* v. *Burnham*, (1909) 41 S.C.R. 410, followed.

Re Glengarry Election, (1888) 14 S.C.R. 453; *Re North Perth Election*, (1909) 18 O.L.R. 661; *Re Lisgar Election*, (1891) 20 S.C.R. 1, and *Re Burrard Election*, (1901) 31 S.C.R. 459, distinguished.

McDougall v. *Davin*, (1896) 2 Terr. L.R. 417, not followed.

2. If the respondent files his preliminary objections after the five days without first applying for an extension of the time, he runs the risk of an order being made to remove them from the file; but, if the respondent applies for the extension after the petitioner moves to strike out the objections because filed too late, and the Judge thinks he should have allowed the extension if applied for in time, the proper course is to order that, upon payment of the costs of the petitioner's motion, the objections do stand as properly filed.

Eaton v. *Storer*, (1882) 22 Ch.D. 91, followed.

Re Provencher Election, Barkwill v. *Molloy*.....6

2. *Dominion Controverted Elections Act, ss. 6, 9a, 12, 14, 16—Security for costs—Affidavit verifying petition—Payment of expense of publishing notice of the petition — Status of petitioner—Proof of list of voters—Provincial lists.*]—1. Only one sum of $1,000 need be deposited by the petitioners as security for costs under section 14 of the Dominion Controverted Elections Act, although they have made the returning officer a party to the petition and claimed relief against him as well as against the respondent.

2. Unless the petitioner is shown to have been completely ignorant of the contents of the petition which he has verified by his affidavit, the latter should be held to be sufficient: *Re Lunenburg Election*, (1897) 27 S.C.R. 226, and in any event, where there are two petitioners and, as to one of them, no such objection is raised, the affidavit of that one is sufficient.

3. It is not incumbent on a petitioner to furnish the returning officer with money in advance to pay the expense of publishing the notice of the petition in a newspaper as required by section 16 of the Act, although the petitioner is liable for such expense.

4. As the Dominion Elections Act makes the Provincial lists the foundation of the Dominion lists, if the former are produced from the custody of the proper officer and proved to have been the official lists in force, no objections as to the regularity of these lists, by reason of alleged non-compliance with requirements of the Provincial statute, should be entertained or inquired into on the trial of a preliminary objection as to the status of a peti-

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tioner under the Dominion Controverted Elections Act.

The petitioners' names were on the certified lists of voters for the electoral district which were compiled and arranged by the committee of Judges in Winnipeg to be transmitted by them to the Clerk of the Crown in Chancery under sub-section 10 of section 9A of the Act. The Clerk of the Crown in Chancery, however, in order to save time, requested the committee to hand the certified lists in Winnipeg to a Mr. McGrath who had been sent from Ottawa by the King's Printer to take charge of the printing of the lists in Winnipeg. The lists were then printed in Winnipeg under Mr. McGrath's supervision, and it was not until after the election was over that the certified lists reached the office of the Clerk of the Crown in Chancery.

Held, notwithstanding this irregularity, that the certified list prepared by the County Court Judges for transmission as above, and now produced from the custody of the Clerk of the Crown in Chancery, was the original and legal list of voters for the electoral district, and that, as the names of the petitioners appeared upon it, they had established the fact of their right to vote at the election.

Re Provencher Election No. 2..16

EQUITABLE CHARGE.

See REGISTERED JUDGMENT, 1.

EVIDENCE.

See BUILDING CONTRACT, 3.

See CRIMINAL CONVERSATION.

See GIFT.

See FRAUDULENT CONVEYANCE.

See INJUNCTION.

See JURY TRIAL, 2.

See LIFE INSURANCE, 1.

See VENDOR AND PURCHASER, 9.

See WILL.

See WINDING-UP, 2.

EXAMINATION FOR DISCOVERY.

Relevancy of questions—Refusal to answer.]—On the pleadings as they stood the plaintiff's case was that he had, at the request of the defendant and for his accommodation, assigned to the defendant an agreement of sale of land securing the sum of $1,500, in order that the defendant might borrow money from a bank on the security of the agreement, that, subsequently, the defendant voluntarily transferred to him certain shares in a company as security for the return of the agreement and that the defendant had refused to re-assign the agreement although the plaintiff was willing to return the shares, whilst the defendant denied that the transaction was a loan and set up that he had actually purchased the agreement from the plaintiff, giving him 15 fully paid up shares in the company as a consideration for it.

Held, (HAGGART, J.A., dissenting,) that the defendant should not be compelled, on his examination for discovery, to answer questions as to whether the shares referred to were or were not fully paid up in fact, or as to what, if anything, had been paid

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by him on the shares, such questions not being relevant to the issues raised.

Hopper v. *Dunsmuir*, (1903) 10 B.C.R. 23, referred to.

Colter v. *McPherson*, (1888) 12 P.R. 630, distinguished.

Morrison v. *Rutledge*.....645

EXECUTORS AND TRUSTEES.

Will—Property held by testator in trust—Costs—Specific performance—Amendment—Damages in lieu of specific performance.]—The defendants resisted the plaintiff's claim for specific performance of their agreement to sell to him the land in question on the ground that they had not entered into a contract in such manner as to satisfy the Statute of Frauds, but the finding of fact by the Judge on this point was in plaintiff's favor. He held, however, that the will under which the defendants were appointed executors and trustees of the estate of the deceased testator did not give them power to sell and convey the land in question which had been held by the testator in trust. This objection had not been set up in the statement of defence, and it appeared to the Judge that the real reason why the defendants had refused to carry out the agreement was that the land was rapidly increasing in value.

Held, that, although the action must be dismissed, the plaintiff should have his costs.

Held, also, that the plaintiff's application, made at the close of the argument, to be allowed to amend, claiming damages in lieu of specific performance, should not be granted, as the defendants should not be called upon to answer such a claim without notice.

Mansfield v. *Toronto General Trusts*.....49

FAIR COMMENT.

See LIBEL.

FI. FA. GOODS.

See GARNISHMENT, 1.

FIRE.

See BUILDING CONTRACT, 2.

See NEGLIGENCE, 1.

FORBEARANCE TO SUE.

See BILLS AND NOTES.

FOREIGN COURT.

See GARNISHMENT, 2.

FOREIGN LAW.

See CRIMINAL CONVERSATION.

FORFEITURE.

See VENDOR AND PURCHASER, 3.

FORFEITURE OF SHARES.

See COMPANY, 1.

FRAUD.

Principal and agent — Real Property Act, R.S.M. 1902, c. 148, ss. 71 and 76.]—1. It is a fraud sufficient to vitiate the sale for a real estate agent to lead the owner of land to confide in him as his agent to get the best possible price for the property and to allow him to close a bargain on

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his behalf when, as a matter of fact, he, the agent, was at the same time acting as agent for the purchaser in an endeavor to get the property at as low a price as possible without disclosing that fact to the owner.

2. The purchaser cannot under such circumstances, although ignorant of the fraud, be allowed to retain the benefit of the transaction procured by his agent.

Pearson v. *Dublin Corporation*, [1907] A.C. 351, followed.

3. Such conduct on the part of an agent is *fraud* within the meaning of that word as used in sections 71 and 76 of The Real Property Act, R.S.M. 1902, c 148, and therefore the procuring by the purchaser of a certificate of title under that Act for the property would not prevent the vendor from having the sale set aside and the property ordered to be reconveyed to him upon payment of moneys received.

Wolfson v. *Oldfield* (*No.* 1)..159

See APPEAL.

See DAMAGES, 3.

See INJUNCTION.

See LOCAL OPTION BY-LAW.

FRAUDULENT CONVEYANCE.

Evidence—Corroboration — Injunction— Guaranty — Husband and wife—13 Eliz., c. 5—Voluntary settlement.]—Motion for an interim injunction to restrain the defendant Mary Wright from disposing of certain shares of stock in certain companies which the plaintiffs alleged had been assigned to her by her husband, against whom the plaintiffs had a judgment, with intent to defeat and delay his creditors within the meaning of 13 Eliz., c. 5. The plaintiffs' judgment against him was founded on a guaranty which he had given prior to his assigning the shares to his wife and the circumstances were such that, if Wright owned the shares, it was probable that the trial Judge would infer an intention on his part to defeat or delay creditors under the statute.

The only evidence as to the ownership of the shares was that of Mary Wright herself given on her examination. As to the shares other than those in the Winnipeg Saddlery Company, the learned Judge found, on the evidence set out in judgment, that plaintiffs had not shown such a reasonable probability of their succeeding in the action as to justify an injunction before trial; but, as to the shares in the Winnipeg Saddlery Company, the evidence, also set out, was such as to afford reasonable ground for plaintiffs' action.

Held, that the injunction should be granted in respect of the shares in the Saddlery Company, as it did not appear that there was any other property available to the creditors and, unless restrained, the defendant might at any moment put it beyond their reach.

Held, also, that the examination of the husband as a judgment debtor in other actions could not be used as evidence on such a motion.

When a person gives a guaranty for the debt of another, he is not entitled afterwards to make a voluntary settlement of

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any of his property unless he retains sufficient to pay the debt guaranteed and the fact that, when the settlement was made, the principal debtor had assets sufficient for payment of the debt cannot be regarded.

Re Ridler, (1882) 22 Ch. D. 74, followed.

Toronto Carpet Co. v. *Wright* 294

GARNISHMENT.

1. *Fi. Fa. Goods—Satisfaction of judgment—Executions Act, R.S.M.* 1902, *c.* 58, *ss.* 24, 25.]—Since the enactment of the statutory provisions now contained in sections 24 and 25 of The Executions Act, R.S.M. 1902, c. 58, payment to the sheriff of the full amount of an execution in his hands does not operate as a discharge of the judgment so as to entitle the judgment debtor to a discharge of a garnishing order issued by the judgment creditor attaching money of the judgment debtor in the hands of the garnishee, because the sheriff has to keep the money for three months to enable other creditors of the judgment debtor to put executions in his hands, in which case the judgment creditor might not receive payment in full out of the money so paid to the sheriff.

Kolega v. *Genser* 518

2. *Debts accruing but not payable at date of service of order—Money payable under building contract—Certificate of engineer as condition precedent—Foreign Court proceedings—Place of payment.*]—This was a contest in the nature of an interpleader issue to decide who were entitled to the money, $2426.44, paid into court by the garnishees under an order of the Referee made upon the application of the plaintiffs for an order for payment to them of the amount owing by the garnishees to the defendant. The plaintiffs had served their garnishing order before judgment on 29th May, 1911, and had obtained judgment on July 10, 1912, for $4765.47.

James M. Eaton claimed part of the money in court under a garnishing order dated June 17, 1911. Other parties made claims under garnishing orders subsequently issued in the courts of Alberta, none of which had been brought to judgment there. The defendant, while he was earning the money paid into court by the garnishees, was a resident of Winnipeg and so continued. The contracts between him and the garnishees were for the erection of certain buildings, some in Manitoba and some in Alberta. They did not specify any place of payment; and, although they provided for certificates from the company's engineer for payments by instalments as the work progressed, the material before the Judge did not show whether or not the certificate of the engineer was to be a condition precedent to the moneys becoming payable.

It appeared from the affidavit filed on behalf of the garnishees that the defendant had in April, 1911, made default in completing two of the three contracts in question, and had then completed all the work which he ever performed under any of the contracts, and that the company's engineer had, in August, 1911, given three separate certificates

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in favor of the defendant for sums aggregating $2916.44 payable to the defendant under the contracts.

Held, (1) Following *Gullivan* v. *Cantelon*, (1907) 16 M.R. 644, that the moneys earned by the defendant were all payable in Winnipeg.

(2) The moneys, having been paid into court here, could not be affected by any legal proceedings in a foreign court.

(3) It is not essential that the debt to be attached should be one for which an action could be brought at the date of the order.

MacPherson v. *Tisdale*, (1885) 11 P.R., per Boyd, C. at 263, followed.

(4) All the moneys earned by the defendant under his three contracts with the garnishees should, in view of the attitude taken by the garnishees in not setting up that the defendant was not entitled to any money under his contracts until their engineer gave his certificate, be deemed to have been accruing due at the date of the plaintiffs' garnishing order; and, therefore, all the money in court should be paid out to the plaintiffs, as their order was first in point of time and their judgment was for a larger amount.

Empire Sash & Door Co. v. *McGreevy. C.P.R. Garnishees*...676

GIFT.

Husband and wife—Delivery of possession — Evidence — Interpleader.]—In order to transfer the property in a chattel by a verbal gift only, there must be an actual delivery to the donee. If manual delivery is not feasible words of present gift accompanied by change of possession might constitute delivery.

The plaintiff in this interpleader issue claimed that an automobile seized by the sheriff under an execution at the suit of the defendant in this issue against her husband had been given to her by the husband, but all that was proved was that the husband had bought the machine because his wife had been ill and was not in a condition to walk, that he intended that she and the family should use it and intended to make a gift of it to her. There was no proof of any actual delivery to the plaintiff, or that any words of gift had been addressed to her by the husband after he had bought the machine.

Held, that the plaintiff had failed in the issue.

Thompson v. *Doyle*, (1896) 16 C.L.T. Occ.N. 286, followed.

Tellier v. *Dujardin*, (1906) 16 M.R. 423, and *Kilpin* v. *Ratley*, (1892) 1 Q.B. 583, distinguished.

Huggard v. *Bennetto* 44

[Affirmed in Supreme Court.]

GUARANTY.

See FRAUDULENT CONVEYANCE.

HABEAS CORPUS.

See CRIMINAL LAW, 3.

HIGHWAY.

See VENDOR AND PURCHASER, 7.

HUSBAND AND WIFE.

See FRAUDULENT CONVEYANCE.
See GIFT.
See LIFE INSURANCE, 2.

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IMPLIED CONTRACT.

See CONTRACT, 4.

IMPLIED WARRANTY.

See BILLS AND NOTES.

INCUMBRANCE.

See VENDOR AND PURCHASER, 2.

INFANT.

1. *Negligence — Contributory negligence*]. —A boy eleven years old should be deemed to be of an age to know the danger of running across a street frequented by motor cars without taking care not to run in front of an approaching car; and, if he does not take such care and is in consequence struck and injured by a car operated without negligence on the part of the driver, the latter will not be responsible in damages.

Hargrave v. *Hart*..... 467

2. *Repudiation of contract made by—Repayment of money received under voidable contract—Non-suit, effect of.*] — An infant who has made a sale of real property, and afterwards during infancy repudiated the contract, may after attaining majority maintain an action to cancel the contract, although such action is not brought immediately; provided that he has done nothing since attaining full age to avoid the previous avoidance; but in order to succeed in the action he should return any money received from the purchaser.

If, in such a case, the money is not paid back or offered, the plaintiff should be non-suited, with a direction, however, that the non-suit should not have the same effect as a verdict on the merits for the defendant.

Phillips v. *Sutherland*.... 491

INJUNCTION.

Promissory notes obtained by fraud—Negotiation of—Affidavit evidence on motion to continue injunction until hearing.]—A defendant may be restrained by injunction from negotiating promissory notes obtained from the plaintiff by false representations, and the plaintiff will not necessarily be left to his remedy for damages even though he might be compensated thereby.

On a motion to continue an interim injunction until the hearing, an affidavit of the plaintiff that he believes and fears that the defendant will negotiate the notes, unless restrained, etc., is sufficient without stating the grounds of such belief, as the allegation of fear of negotiation remains.

Re Young, [1900] 2 Ch. 753, distinguished.

Thompson v. *Baldry*..... 76

See FRAUDULENT CONVEYANCE

See MUNICIPALITY, 1.

INSOLVENCY.

See PARTNERSHIP, 1.

See WINDING-UP, 2.

INTENT, PROOF OF.

See VENDOR AND PURCHASER, 6.

INTEREST.

See ARBITRATION AND AWARD.

See DAMAGES, 2.

See MORTGAGOR AND MORTGAGEE.

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INTEREST IN LAND.

See CONTRACT, 1.

INTERIM ALIMONY.

See ALIMONY.

INTERPLEADER.

See GIFT.

JOINDER OF CAUSES OF ACTION.

See JOINDER OF PARTIES, 1, 2.

JOINDER OF PARTIES.

1. *Joinder of causes of action—Slander—Conspiracy to defame.*]—Where a number of parties are charged with having in collusion defamed the plaintiff this does not sufficiently indicate to the defendants that they are being charged as members of a conspiracy to defame the plaintiff, and a paragraph containing such charge should be struck out as embarrassing with leave to amend.

Alexander v. *Simpson*..... 424

2. *Slander—Joinder of causes of action—Striking out pleading as embarrassing—King's Bench Act, Rule 326.*]—A number of defendants cannot be sued together for slander without an allegation that they have conspired together to slander the plaintiff; and, where the statement of claim seeks damages against a number of persons for false imprisonment in one paragraph, and for slander in other paragraphs without any allegation of a conspiracy to defame, the latter paragraphs should be struck out as embarrassing under Rule 326 of the King's Bench Act.

Carrier v. *Garrant*, (1873) 23 U.C.C.P. 276, followed.

Messervey v. *Simpson*..... 421

JUDGE'S CHARGE TO JURY.

See CRIMINAL LAW, 2.

See LIBEL.

JUDGMENT IN PERSONAM.

See VENDOR AND PURCHASER, 9.

JURISDICTION.

Service of statement of claim out of the jurisdiction—King's Bench Act, Rule 201 (g)—Parties to action—Vendor and purchaser—Specific performance.]—When a vendor of land, under an agreement of sale, has conveyed the land and assigned the money payable by the purchaser to a third party, the purchaser may maintain an action against such third party for specific performance of the agreement, and the vendor is a proper, if not a necessary, party to such action.

Such third party had been duly served within the jurisdiction with the statement of claim in such an action. The agreement in this case was made, and the purchase money was to be paid, within the jurisdiction. The vendor of the land in question, which was in another province, had ceased to be a resident of Manitoba when the action was commenced.

Held, that the statement of claim might, under paragraph (*g*) of Rule 201 of the King's Bench Act, be served upon the vendor out of the jurisdiction.

Smith v. *Ernst* (No. 1)..... 317

See CRIMINAL LAW, 1.

See VENDOR AND PURCHASER, 9.

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JURISDICTION OF REFEREE.

See JURY TRIAL, 1.

JURY TRIAL.

1. *Application for order for, after defendant has given notice of trial before a Judge — King's Bench Act, ss. 59, 60—Jurisdiction of Referee.*]—The defendant cannot, by giving notice of trial before a Judge without a jury, deprive the plaintiff of his right to apply afterwards for, and obtain, an order under sub-section (b) of section 59 of the King's Bench Act for the trial of the action by a jury.

The Referee has jurisdiction to make an order for trial of an action by a jury.

Moyer v. *Jones*..... 803

2. *Application for order for a jury — Negligence — Accident — Question of damages—Sufficiency of material to show seriousness of injury.*]—On appeal from the Referee, a Judge refused an order for trial of the action by a jury. He thought it was a case which might well be tried by a jury, but he thought the material before him insufficient to show that the injury sustained by the plaintiff was of a serious character, and suggested that an affidavit of the physician who had attended the plaintiff should be obtained.

That material consisted of an affidavit of the plaintiff stating that he had received a wound in the head by which his skull was fractured; that he had been knocked insensible and remained unconscious until he found himself in the hospital; that he remained there for 20 days, and that a semi-paralysis was affecting one side; and an affidavit of his solicitor setting forth what the doctor who had attended the plaintiff had said about the case.

The plaintiff was fully cross-examined on his affidavit, and made out a case of considerable and, in the opinion of the Court, serious injury.

Held, on appeal to this Court, that the Judge should have been satisfied with the material in this case, and that there should be an order for trial by jury.

Navarro v. *Radford-Wright Co*..... 730

LACHES.

See VENDOR AND PURCHASER, 4, 6.

LANDLORD AND TENANT.

Liability of landlord for dangerous condition of premises causing injury to third party—By-law of municipality requiring wells to be kept properly covered.]— 1. There is no common law liability on the part of an owner of land in the occupation of a tenant to keep a well on the premises covered for the protection of any person going, or pasturing animals, on the land with the permission of the tenant.

Lane v. *Cox*, [1897] 1 Q.B. 415, and *Cavalier* v. *Pope*, [1905] 2 K.B. 757, [1906] A.C. 428, followed.

2. A by-law of a municipality, requiring that every well therein that is not fenced in shall at all times be kept properly covered,

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except when necessarily opened for the purpose of obtaining water or of cleaning or repairing it, casts no duty upon the owner of the land if it is in the possession of a tenant and the owner has no right to go upon the land for the purpose of attending to the covering of the well, or for any other purpose.

Quære, whether a person who has been injured by reason of a breach of a by-law imposing a duty upon a particular person, and a penalty for such breach, can maintain an action for damages against such person.

Love v. *Machray*..... 52

See NEGLIGENCE, 3.

LAND OUT OF THE JURISDICTION.

See VENDOR AND PURCHASER, 9.

LIBEL.

Privileged communication — Malice — Fair comment—Judge's charge to jury—New trial—Criminal Code, s, 161—Secret Commissions Act, 1909—Municipal officers taking commissions on sales to their municipalities.] — The plaintiffs, manufacturers of corrugated steel plate culverts used chiefly by municipalities, having sent to various municipal officers a circular pointing out that the law prohibited the payment of any commission direct to such officers on future sales of goods to the municipalities and suggesting that the recipient of the circular should select some business associate or friend to act as agent for the plaintiffs for future sales of these goods on commission, the defendants, rival manufacturers of the same articles, mailed to a large number of municipal officers copies of that circular accompanied by a criticism, headed "Bribery! Bribery!! Bribery!!!," pointing out the dishonesty of the acts suggested by the plaintiffs' circular and the unfairness of the competition and characterizing such acts as "graft."

Plaintiffs claimed damages for the alleged libel, and had a verdict for $2000.

Held, *per* HOWELL, C.J.M., RICHARDS, PERDUE and HAGGART, JJ.A., that the defendants' circular was *prima facie* privileged, and that the trial Judge should have so told the jury and should also have instructed them that the onus was upon the plaintiffs to prove express malice to defeat the privilege, and that there should be a new trial because of such non-directions.

Clark v. *Molyneux*, (1877) 3 Q.B.D. 247, and *Spill* v. *Maule*, (1869) L.R. 4 Ex. 236, followed.

Appeal allowed with costs in the cause to the defendants in any event—Costs of the new trial to be costs in the cause.

Per CAMERON, J.A., Without considering whether the defendants' circular was privileged or not, there should be a new trial on the issue whether or not it was a fair comment without malice on a matter of public interest, and the trial Judge should have submitted the question of malice to the jury and should also have charged them that the taking of remuneration by municipal officers from persons having

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transactions with the municipalities was not only forbidden by the Criminal Code and by the law prior thereto, but was also essentially fraudulent and dishonest, also that the fact that any such taking of remuneration was known to any or all of the members of a council could make no difference in the criminal, civil or moral liability of the parties to it.

In the event of a new trial, evidence of such knowledge should be rigorously excluded as irrelevant.

Thomas v. *Bradbury*, [1906] 2 K.B. 627, and *Plymouth Mutual* v. *Traders' Publishing Association*, [1906] 1 K.B. 403, followed.

Winnipeg Steel Granary & Culvert Co. v. *Canada Ingot Iron Culvert Co.*.....576

[Appealed to Supreme Court.]

LIEN ON LAND.

See DAMAGES, 1.

LIFE INSURANCE.

1. *Conditions in application—Answers to medical examiner—Evidence — Warranty — Construction of contract.*]—In an application for life insurance, signed by the applicant, he declared that "to the best of my knowledge, information and belief, my health is good, * * * that I usually enjoy good health, * * * that the statements made above are respectively full, complete and true; and I agree that such statements with this declaration, and any statements made or to be made to the company's examining physician, shall form the basis of the contract for such assurance; and, if there be therein any untruth or suppression of facts material to the contract, the policy shall be void."

Held, that this warranty, so far as it applied to the applicant's statements to the examining physician, applied to the answers actually given to him by the applicant, and not necessarily to those taken down in writing by the examiner, so that, if the applicant actually gave truthful information to him in answer to a question on a material point, the policy was not avoided by reason only that such information did not appear in the written answers, also that the qualification, "to the best of my knowledge, information and belief," extended to everything in the paragraph above quoted.

Miller v. *Confederation Life*, (1888) 14 S.C.R. 330, and *Joel* v. *Law Union*, [1908] 2 K.B. 863, followed.

The trial Judge found upon the evidence that the Insurance Company had not proved affirmatively that the applicant knew he had heart disease at the time of the application, also that he had sufficiently disclosed to the examiner the facts in answer to the question as to when and for what disease he had last consulted a physician.

Held, (PERDUE, J.A., dissenting), that these findings were warranted by the evidence and the verdict for the plaintiff should stand.

Sawyer v. *Mutual Life Assurance Company*.....613

[Reversed in Supreme Court.]

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2. *Policy made payable to wife of testator—Deduction by company of amounts of loans and promissory notes made by deceased—Life Insurance Act, R.S.M., 1902, c. 83, ss. 7 and 15—Appropriation in favor of wife of policy made payable to insured or his estate—Will.*] —1. If a policy of insurance on a man's life is made payable to his wife, any loans effected upon it for the benefit of the husband, though secured by assignments executed by both and by the covenant of both to repay them, are debts of the husband's estate; and, if the insurance company after the death of the insured, upon paying the amount of the policy to the widow, deducts the amounts of the loans, she will be entitled to have the moneys made good to her out of the general estate of the deceased; and the same will be the case in respect to any unpaid premiums on the policy for which the deceased had given his promissory notes, but not to any other unpaid premiums deducted by the company in pursuance of the terms of the policy.

2. A declaration of the insured in respect of a policy of insurance on his life in favor of his personal representatives, that, if the same be subsisting at his death and not sold, surrendered, assigned or otherwise disposed of, then upon his death it shall be for the benefit of his wife, if she survives him, is not, under section 7 of The Life Insurance Act, R.S.M., 1902, c. 83, an effectual appropriation of the benefit of the policy to the wife. To be effective such a declaration must create an immediate trust in favor of the wife.

CAMERON, J.A., dissenting.

3. Such a declaration so worded as to take effect only on the death of the insured is a testamentary document and therefore invalid unless executed and attested as a will. CAMERON, J.A., dissenting.

Habergham v. *Vincent*, (1793) 2 Ves. 204, and *Foundling Hospital* v. *Crane*, [1911] 2 K.B. 367, followed.

The deceased by his will gave all his property real and personal "including all my life insurance" to the defendants as trustees upon certain trusts and also said, "Any of my life insurance which is made payable to my wife specifically shall be her own estate, moneys and property and are not intended to be affected by the terms of this will." He had previously executed, in respect of two of his policies not made payable to his wife, declarations as outlined in paragraph 2 above.

Held, CAMERON, J.A., dissenting, that those two policies remained part of his general estate, and that the defendants, who had received and paid over the insurance moneys to the widow, were entitled to recover the moneys from her on their counterclaim.

Green v. *Standard Trusts Co.* 397

LOCAL OPTION BY-LAW.

Petition for repeal of—Liquor License Act, R.S.M., 1902, c. 101, ss. 74, 74A, 74B—Signatures of petitioners—Aliens—Misnomer—Misrepresentation—Fraud—Affidavit—Duty of council of municipality on receipt of petition—Burden of proof—Mandamus.]—

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This was an application for a *mandamus* to compel the Council of the Rural Municipality of Swan River to submit a by-law to the electors for the repeal of a local option by-law then in force under the provisions of the Liquor License Act, R.S.M. 1902, c. 101.

On objections taken by counsel for defendants to the petition filed with the Council under section 74 of the Act, the following points were decided:

1. The removal of the paper fasteners by which the various sheets of which the petition was composed were originally held together, in order to attach the affidavit of execution required by section 74B added to the Act by section 3 of chapter 35 of 10 Edward VII, the whole having been properly fastened together again, did not invalidate the petition.

2. When the burden of proof is upon the party seeking to show that a person whose name is on the municipal voters' list is not a British subject, it is not sufficient to prove:

(a) That the person had lived in the United States and had not been naturalized in Canada, or

(b) That the person was born in the United States and had never been naturalized in Canada, as his parents might have been British subjects.

3. A mistake in the Christian name of a voter on the list will not be sufficient to warrant the striking of his name off the petition, if it appears by the evidence that the petitioner is really the person intended to be named on the list.

4. It is not misrepresentation or fraud, sufficient to warrant the striking of a petitioner's name from the list, for the person procuring the signature to tell him that the petition was for the purpose of changing the law so that a man could have liquor in his own house without breaking the law; for, under local option, he can, in general, only do so by importing the liquor from some point outside the Province.

5. Even before the enactment of said section 74B, the Council, on receipt of such a petition, had no right to look at extrinsic evidence to prove the insufficiency of it, or to weigh the sufficiency of affidavits or to pass upon the credibility or reliability of deponents, and now the right of the Council is limited to an examination of the petition itself and of the affidavit or affidavits of execution.

Re Williams and Brampton, (1909) 17 O.L.R. 398, followed.

6. Since neither section 74B nor the form of affidavit provided requires any statement of the date when the petitioners signed, it is not incumbent upon the applicant for a *mandamus* to prove affirmatively that the petition had been signed within the calendar year in which it was filed as required by section 74A added by the statute of 10 Edw. VII.

That statute prescribes what evidence is required and the Court should not call for more.

7. The fact that the witness included in his affidavit of execution the names of fourteen voters as resident, when it was shown that they had ceased to be resident because their homes

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had been taken out of the Rural Municipality and put into the Village Municipality of the same name, did not warrant the conclusion that the witness should not be believed as to the rest of his affidavit, since the Judge was not satisfied that the misstatement was other than a *bona fide* mistake.

Rex ex rel. Sovereen v. *Edwards*.....790

MAGISTRATE.

See CRIMINAL INFORMATION.

MALICE.

See LIBEL.

MANDAMUS.

See LOCAL OPTION BY-LAW.

MARRIAGE.

See CRIMINAL CONVERSATION.

MASTER AND SERVANT.

See NEGLIGENCE, 5, 6.

MASTER'S OFFICE, PRACTICE IN.

See REGISTERED JUDGMENT, 2.

MEASURE OF DAMAGES.

See BILLS AND NOTES.

MECHANICS' LIEN.

Assignment of lien—Building contract—Architect's certificate—Right of action—Claims for extras.] —The contractor, having made default in carrying out a building contract, turned over the work to a committee of his creditors and assigned to them the moneys then earned and thereafter to be earned, and the owner signed an agreement whereby the committee was to complete the building and take the place of the contractor.

Held, that there was a sufficient assignment to the committee of the contractor's right to a lien under The Mechanics' and Wage Earners' Lien Act.

The contract provided that the final payment should not be due until the contractor should produce evidence that no mechanics' liens other than his own existed in respect of the work. No such evidence was given, but there were in fact no other liens filed and the agreement between the contractor and the creditors, to the owner's knowledge, provided that the creditors would not file liens.

Held, (1) That, under the circumstances, the objection was a technical one and effect should not be given to it.

(2) That, although the final certificate of the architect is, under a contract, a condition precedent to the right of action, it is not essential that the issuing of it should be made known to the owner before the commencement of the action.

Brown v. *Bannatyne*, (1912) 22 M.R. 260, followed.

(3) When a building contract provides that no claims for extras shall be allowed unless ordered in writing and that the amount to be allowed for them shall be settled by the architect, if the latter has considered and dealt with such claims and settled the amount to be allowed for them in giving his final certificate, the

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contractor can recover nothing further in respect thereof.

Alsip v. *Monkman*.....779

MISNOMER.

See LOCAL OPTION BY-LAW.

See WILL.

MISREPRESENTATION.

See LOCAL OPTION BY-LAW.

See PRINCIPAL AND AGENT, 3.

See VENDOR AND PURCHASER, 5.

MISTAKE.

See WILL.

MORTGAGOR AND MORTGAGEE.

Interest—Winding-up of Company—Payment of the mortgage money.]—By the terms of a mortgage from one Cooper to the Company, it was provided that all payments upon it should be duly made if paid to the credit of the mortgagee at the Eastern Townships Bank of Canada, Winnipeg, Manitoba.

The solicitors of the mortgagor paid the full amount due under the mortgage into the Bank by a certified cheque indorsed for deposit to the credit of the Company; but, owing to information they had as to dissensions amongst the directors of the Company and as to there being two sets of officers, they attached a letter instructing the Bank to hold the money until certain conditions were fulfilled, including, amongst others, an assignment or discharge of the mortgage assented to by every shareholder who had or might have any interest in the Company. Shortly afterwards, an order for the winding up of the Company was made and a permanent liquidator appointed.

Held, that the mortgagor had not paid the money in accordance with the provision quoted and was liable for interest on the amount up to the date of its actual receipt by the liquidator and at the rate specified in the mortgage.

A mortgagor has no right to stipulate that the money shall not be handed over until a discharge, together with the title deeds, is handed over.

Peers v. *Allen*, (1872) 19 Gr. 98, and *Lacey* v. *Waghorne*, (1888) 59 L.T. 208, followed.

It was not the duty of the liquidator, on his appointment, to execute a discharge of the mortgage and take the money into his custody as being property and effects of the Company; for, under the circumstances, the money was not property of the Company available for the liquidator and, in any case, by the terms of the letter of instruction to the Bank, he could not have got the money if he had tendered only a discharge executed by himself.

Re Kootenay Valley Fruit Lands Company.....300

MUNICIPAL ELECTION.

See QUO WARRANTO.

MUNICIPALITY.

1. *Taxation of personal property — Assessment Act, R.S.M., 1902, c. 117—Injunction—Special Act validating assessments and*

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rates.]—This action arose out of a distress of the plaintiffs' chattels by the defendant municipality for alleged arrears of taxes on their personal property, and an interim injunction against sale of the chattels had been issued, as it was shown that there had been many and grave defects and irregularities in the assessment of the property and in the by-laws levying rates owing to non-compliance with the requirements of the Assessment Act, R.S.M. 1902, c. 117.

Before the action came on for trial, the Provincial Legislature passed an Act respecting the Rural Municipality of Minitonas, chapter 38 of 10 Edward VII, containing appropriate recitals in the preamble and expressly validating the assessments and rate by-laws of the municipality for the years in question and providing that "the validity and legality of said assessments and by-laws, levies and taxes shall not be questioned in any action, suit or proceeding in any court on account of any defect or irregularity in said proceedings," etc. No exception of pending litigation was made in this Act which was a Public Act.

Held, that this Act was a declaratory Act and bore evidence upon its face of an intention to make it applicable to all actions or suits, including any then pending, and it should, therefore, be construed to be retro-active in its effect.

Attorney-General v. *Hertford*, (1849) 3 Ex. 670, and *Attorney-General* v. *Theobald*, (1890) 24 Q.B.D. 559, followed.

Held, also, that, by the effect of the Act in question, the defendants had a right to proceed with a sale of the chattels and the action should be dismissed.

Russell v. *Toronto*, [1908] A.C. 493, followed.

O'Brien v. *Cogswell*, (1889) 17 S.C.R. 420, and *Whelan* v. *Ryan*, (1891) 20 S.C.R. 65, distinguished.

McCutcheon Lumber Co. v. *Rural Municipality of Minitonas*.....681

2. *Drainage—Municipal Act, R.S.M., 1902, c. 116, s. 516—Improper exercise of statutory powers—Turning ditch into ravine not a natural water course—Damages.*]—1. A municipality authorized under the Municipal Act to construct a ditch through another municipality will be liable to the owner of adjoining land for injury caused to the land by turning the ditch into a ravine which is not a natural water course and excavating in the ravine so as to enable it to carry off the water to a river, when it might have continued the ditch to the river without making use of the ravine, but will not be liable for damages caused by the construction of the ditch itself along the edge of a public highway. Discussion of the proper measure of damages to be allowed to the plaintiffs in consequence of the ravine having been rendered impassable by the defendants' works.

Lamontagne v. *Woodlands*..495

See ATTORNEY-GENERAL.

See DAMAGES, 3.

See LIBEL.

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NEGLIGENCE.

1. *Fire—By-law of municipality—Liability to private person for contravention of.*]—The violation of a statutory or valid municipal regulation established for the protection of the public will not give a right of action to a private person whose property is damaged or destroyed in consequence of it. It is only when such statute or by-law is established for the benefit of private persons, and other elements of actionable negligence concur, that a person belonging to the protected class may base his action in part upon such violation, which, in that case, constitutes negligence in itself.

The trial Judge in this case found no evidence of anything having been done or left undone by the defendants to constitute a breach of the City by-law as to the storing and handling of gasoline, and no evidence of negligence on the part of the defendants otherwise, and held that they were not liable in damages to the plaintiff for the destruction of his motor car by a fire which broke out in their garage.

Bears v. *Central Garage Co.*..292

2. *Railway company—Animals straying on to railway track—Railway Act, R.S.C. 1906, c. 37, s. 294, s-s.* 4.]—The plaintiff's claim was for the killing of four horses by a train of the defendants. The horses had been in an enclosure surrounded by a wire fence four feet high and about half a mile from the railway. There was an opening in the fence between a building and a tree which the plaintiff said he had closed with boards to the height of 50 inches on the night before the horses were killed. In the morning he discovered that the boards closing the gap had been broken down and that the horses were gone. He and his family made immediate and diligent search for them, but it appeared that, after wandering about, they had got on to the railway track at a road crossing where there were no cattle guards as required by the Railway Act, and were run into by a train near that point.

Held, that this evidence had not been displaced by that of the witnesses for the defence, and, upon it, the defendants had not satisfied the *onus* of proving that the horses had "got at large through the negligence or wilful act of the owner" cast upon them by sub-section 4 of section 294 of the Railway Act, R.S.C., 1906, c. 37, and were, therefore, liable under that sub-section to the plaintiff for the damages caused to him.

Rogers v. *Grand Trunk Pacific R. W. Co*.....349

3. *Bailment—License to keep horses in stable for reward—Liability for injury to horse caused by defect in building—Landlord and tenant.*]—By an arrangement made with defendants the plaintiffs were permitted to use a stable of the defendants to keep and feed their horses in. The defendants supplied the feed and charged 50 cents per head per day for this and the stable accommodation. The plaintiffs' man looked after the horses and fed them, but there was no one

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on behalf of the plaintiffs in charge of the horses during the night. The stable was at the same time used by the defendants for horses in transit during shipment over the railway, and no particular stalls were allotted for the plaintiffs' horses. One night one of the plaintiffs' horses, a heavy draft animal, broke through the flooring of the stall it occupied and was so injured that it died.

The defendants' agent in charge of the stable had requested the plaintiffs' stableman to report to him any defects in the flooring he might notice and had several times made repairs on receiving such reports, but there was no agreement by the plaintiffs that they would make such reports.

Held, that the relationship of the parties was either that of bailor and bailee or licensor and licensee, and not that of landlord and tenant, and that the defendants were under a duty to have the stable reasonably fit for its purpose, and so were guilty of negligence in not keeping it in proper repair and were therefore liable to the plaintiffs in damages for the loss of their horse.

Searle v. *Laverick*, (1874) L.R. 9 Q. B. 122; *Brabant* v. *King*, [1895] A.C. 632; *Stewart* v. *Cobalt*, (1909) 19 O.L.R. 667, and *Francis* v. *Cockrell*, (1870) L.R. 5 Q.B. 501, followed.

RICHARDS, J.A., dissented.

Gunn v. *Canadian Pacific Ry.* 32

4. *Fall of wall of damaged building—Liability of owner for damages caused by.*]—The owner of a damaged building the walls of which are, to his knowledge, in danger of falling is bound to exercise the utmost diligence and cannot delegate to others, whether contractors, architects or engineers, the duty of taking effectual means of preventing the falling of the walls to the injury of persons occupying adjoining land or their property, and it is no excuse that he placed the matter in the hands of an architect or a building inspector upon whose skill he relied and that he, in good faith, acted upon their advice that the walls were not in danger of falling.

Jolliffe v. *Woodhouse*, (1894) 10 T.L.R. 553; *Valiquette* v. *Fraser*, (1907) 39 S.C.R. at p. 4; *Ainsworth* v. *Lakin*, (1902) 57 L.R.A. 132; *Hughes* v. *Percival*, (1883) 8 A.C. 445; *Attorney-General* v. *Heatley*, [1897] 1 Ch. 560; *Todd* v. *Flight*, (1860) 9 C.B. N.S. 377; *Tarry* v. *Ashton*, (1876) 1 Q.B.D. 314; *Bower* v. *Peate*, (1876) 1 Q.B.D. 321; *Dalton* v. *Angus*, (1881) 6 A.C. 740, and 3 *Halsbury*, p. 315, followed.

McNerney v. *Forrester*.....220

5. *Master and servant—Railway company—Res ipsa loquitur—Accident.*]—A master is not liable for an injury caused to a workman by the occurrence of an accident of an exceptional nature wholly unexpected, and which from past experience, as shown by the evidence, could not reasonably have been anticipated by the master or his employees, such as the springing back into a straight position of a steel rail, which had been bent or twisted as the result of an accident on the railway, as soon as the end of it

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is released by cutting off a nut by which it was held to the next rail. Under such circumstances negligence is not to be presumed and the maxim *res ipsa loquitur* has no application.

Ferguson v. *C. P. R. Co.*, (1908) 12 O.W.R. 943, and *Readhead* v. *Midland*, (1869) L.R. 4 Q.B. 379, followed.

Rostrum v. *Canadian Northern Ry Co*.....250

6. *Master and servant—Use of defective materials—Liability of master for defect in system, works and ways provided—Res ipsa loquitur.*]—In the course of his employment as a carpenter in the erection of a building for the defendants, the plaintiff had to walk along the top of one of a number of wooden joists 20 feet long, 10 inches wide and 6 inches thick, fixed in a position 25 feet from the ground, the six inch surface being uppermost. When the plaintiff reached the centre of this joist, it broke across the broad surface in a diagonal splinter about 6 feet long, and the plaintiff fell to the ground, receiving serious and permanent injury.

As the joists were delivered at the building, they were inspected by the foreman whom the trial Judge found to be an experienced, competent, careful and efficient man. He had rejected quite a number of them for different reasons and the trial Judge found that, although he did not submit them to any test, or even to a careful visual examination, his examination was sufficient to ascertain whether they were straight and of the proper length or had any other defects apparent to a person standing by and looking at them as they were being handled. They had also to pass through the hands of a number of other workmen before they were finally placed in position, but no one noticed the defect in that particular joist before the accident.

Held, that, under the circumstances set out, there was *prima facie* evidence of neglect on the part of the master to fulfil his duty at common law to provide fit and proper places for the workmen to work in and a fit and proper system and suitable materials under and with which to work, a duty which cannot be got rid of by delegating it to others; and that the defendants had not satisfied the *onus* thrown upon them of showing that they had exercised reasonable and due care in the inspection of the defective joist before it was placed in position.

Brooks v. *Fakkema*, (1911) 44 S.C.R. 412; *Ainslie* v. *McDougall*, (1909) 42 S.C.R. at 424, and *Smith* v. *Baker*, [1891] A.C. 325, followed.

Per RICHARDS, J.A.—It might fairly be held that the defendants had provided the joist in question as a part of their ways and system in connection with the plaintiff's work and, if so, there was a liability at common law and the defendants could not avail themselves of the fellow-servant line of defence.

Judgment for the plaintiff for $7,000 damages.

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See BAILMENT.
See INFANT, 1.
See JURY TRIAL, 1, 2.

NEW TRIAL.

See CRIMINAL LAW, 2.
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NON-DIRECTION.

See CRIMINAL LAW, 2.

NON-RESIDENT.

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NON-SUIT.

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NOTICE.

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NOTICE OF FORFEITURE.

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NOTICE OF MOTION.

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OPTION TO PURCHASE LAND.

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PARTIES TO ACTION.

See ADMINISTRATION OF ESTATES.
See JURISDICTION.
See PARTNERSHIP, 1.
See REAL PROPERTY ACT, 2.
See REGISTERED JUDGMENT, 3.

PARTNERSHIP.

1. *Contribution between partners—Parties to action—Insolvency.*]—When a number of persons have joined in making a promissory note, all being equally liable, and one of them is compelled to take up the note, he may maintain an action for contribution and get judgment against any one of the others for his proportionate share of the amount without making the rest parties, or, if they have been made parties, without evidence as to the state of the cause as against them: *Lindley on Partnership*, 7th ed., p. 501.

If it is shown that some of the partners are insolvent, the rest may be bound to contribute a correspondingly greater proportion of the amount: *Dering* v. *Earl of Winchelsea*, (1787) 1 Cox, 318, White & Tudor's Equity Cases, 7th ed. vol. I, p. 535.

Lamb v. *North*.....360

2. *Agreement to enter partnership—Stipulation for execution of articles of partnership.*]—Action

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for an account of an alleged partnership between plaintiff and defendant as restaurant keepers.

Robson, J., at the trial, dismissed the claim for an account, holding that no partnership had been entered into, but, pursuant to an amendment at the trial, directed a reference to the Master to ascertain the proper sum payable to the plaintiff for his services.

Plaintiff appealed.

Held, per RICHARDS and PERDUE, JJ.A., that a partnership exists as soon as the parties begin to engage in business together with a view to their mutual profit, although they contemplate the signing of a formal partnership agreement and never sign it: Partnership Act, R.S.M. 1902, c. 129, ss. 4, 22; *Lindley on Partnership*, 7th ed. 15, 731.

Syers v. *Syers*, (1876) 1 A.C. 174; *Battley* v. *Lewis*, (1840) 1 M. & G. 155, and *England* v. *Curling*, (1844) 8 Beav. 129, followed.

Further, that, in their view of the effect of the evidence as set out in their judgments, a partnership had existed between the parties from 23rd January to 7th July, 1911, and that the plaintiff was entitled to an account of the profits of it, although the contemplated agreement of partnership had never been prepared or signed and the plaintiff had withheld his promised contribution to the capital pending such signature.

Held, per CAMERON, J.A., HOWELL, C.J.M., concurring, that, in his view of the effect of the evidence as set out in his judgment, the parties had never arrived at an agreement as to the terms of their contemplated partnership and no actual partnership between them had ever been created, and that the judgment of the trial Judge should be affirmed.

The Court being equally divided, the appeal was dismissed without costs.

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PAYMENT.

See BUILDING CONTRACT, 1, 2, 3.

See GARNISHMENT, 2.

See MORTGAGOR AND MORTGAGEE.

PLEADING.

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POUND BREACH AND RESCUE.

See CRIMINAL LAW, 4.

POWER OF SALE.

See REGISTERED JUDGMENT, 3.

POWERS OF COURT.

See COSTS, 3.

PRACTICE.

1. *One defendant serving notice of trial before service of statement of claim on other defendant—When cause at issue—Abandonment by plaintiff of proceedings against one of several defendants.*] —Where there are two defendants, one of whom has not been

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served with the statement of claim, the cause is not at issue, although the time allowed by the rule for such service has expired, for it is possible that plaintiff might succeed on an application under Rule 176 for leave to make the service. The defendant who has been served cannot, therefore, under such circumstances, bring on the action for trial, and a notice of trial served by him on the plaintiff should be set aside.

Ambroise v. *Evelyn*, (1879) 11 Ch.D. 759, followed.

Vandusen v. *Johnson*, (1883) 3 C.L.T. 505, not followed.

The proper course for the appearing defendant to take is to apply to strike out the name of the other defendant on the ground of abandonment after first inquiring as to the plaintiff's intention: *Ambroise* v. *Evelyn*, *supra*, and *Foley* v. *Lee*, (1888) 12 P.R. 371.

Sellick v. *Town of Selkirk*..323

2. *Stay of proceedings—Action brought without authority—Notice of motion.*]—When an application is made by a defendant to stay proceedings on the ground that the solicitor is prosecuting the action without the plaintiff's authority, notice of the motion should be given to the plaintiff personally as well as to the solicitor.

Thatcher v. *D'Aguilar*, (1855) 11 Ex. 436, followed.

Ross v. *Webb*.....257

3. *Summons to quash by-law—Grounds of application should be stated—Amendment—St. Boniface Charter, 7 & 8 Edward VII, c. 57, s. 517—Application by summons or notice of motion.*]—1. Under section 517 of the St. Boniface Charter, 7 & 8 Edw. VII, c. 57, an application to quash a by-law of the City for illegality is properly made by summons and not by notice of motion.

2. Although the statute does not expressly provide that the grounds intended to be set up should be stated in the summons, yet, to avoid injustice, such requirement should be implied. In this case the omission to state the grounds in the summons was by inadvertence, and permission was given the applicant, upon alleging plausible grounds and upon proper terms as to costs, to amend and re-serve the summons, making it returnable at such a date as would allow the ten clear days notice required by the section.

Re Peck and Township of Ameliasburg, (1888) 12 P.R. 664, followed.

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PRELIMINARY OBJECTIONS.

See ELECTION PETITION, 1.

PRINCIPAL AND AGENT.

1. *Commission on sales of shares—Sub-agent—Revocation of agency.*]—Plaintiff had an agency to sell shares of stock in a mining company for defendant on a commission of five cents per

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share. He employed one McMeans as a sub-agent to sell the shares, paying him three cents per share. Defendant was aware of this, but afterwards employed McMeans to sell more of the shares and paid him direct a commission of five cents per share. 70,000 shares were sold by McMeans under this arrangement. There was no effectual termination of the agency relationship between plaintiff and defendant on the one hand, or of that between plaintiff and McMeans on the other.

Held, that McMeans should be deemed to have been plaintiff's sub-agent in respect of such sales and that defendant was liable to plaintiff for the profit of two cents per share which he would have received if the commission had been paid to the plaintiff direct.

Wilkinson v. *Alston*, (1879) 48 L.J.Q.B. 733, followed.

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2. *Commission on sale of land—Procuring ready, willing and able purchaser—Liability of agent of vendor on agreement to share commission with another agent who introduces purchaser — Purchase from owner over the head of option holder.*]—The principle that a vendor of land may be liable to his agent for commission, when he sells to a party introduced by the agent on terms less advantageous to him than those on which the agent was instructed to procure a purchaser, has no application to a case where the defendant is himself only an agent who has agreed to share with the plaintiff the commission to be earned from the vendor in case of sale to a purchaser introduced by the plaintiff.

When the purchaser so introduced fails to agree with the vendor on the terms of the proposed purchase, no commission has been earned or can be payable.

In this case the vendors, defendant's principals, were only holders of an unexpired option of purchase from the owner, and the fact that the purchaser, after abortive negotiations with the option holders, dealt with the owner direct and purchased the property from him on other terms before the option had expired, was held not to entitle the plaintiff to recover anything from defendant on the special contract between them, or to show that the proposed purchaser had been ready and willing to purchase from the option holders on the terms specified.

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3. *Company — Authority to agent — Contract to re-purchase shares sold—Rescission of contract—Recovering back money paid —Misrepresentation.*]—An agent of the defendants, a company incorporated under The Manitoba Joint Stock Companies Act, sold the plaintiff a number of shares of stock in another company, at the same time giving him, with the authority of the vice-president of the defendants, an agreement to re-purchase the shares on a date named and at an advanced price, if the plaintiff desired to sell. Afterwards, on the plaintiff calling on the company to re-purchase, it appeared

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that there had been no authority given to the vice-president to empower the agent to enter into any such bargain.

Held, that the representation by the defendants' agent to the plaintiff that the defendants would re-purchase the shares, was a part of the contract of sale of the shares carried out by the defendants and that the defendants, having received the purchase money, should be compelled to restore the plaintiff to his original position by re-payment of what he had paid for the shares with interest on his re-assigning them to the defendants.

Whaley v. *O'Grady, Anderson & Co*.....379

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PROMISSORY NOTES.

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PROVINCIAL LANDS.

See TAXATION OF LAND.

PUBLIC SCHOOLS ACT.

R.S.M. 1902, c. 148, s. 2 (m), s. 48 (n)—Non-resident pupils, payment of fees by.] —Under sub-section (*m*) of section 2 of The Public Schools Act, R.S.M. 1902, c. 148, as re-enacted by 2 Geo. V., c. 65, s. 2, the children of parents who have their permanent and principal places of residence within a school district cannot be said to be "non-resident pupils," although the parents neither pay nor are liable to pay a school tax in such districts equal to the average school tax paid by the actual tax-payers of such district. Consequently the trustees of the school district cannot, under sub-section (*m*) of section 48 of the Act, collect any fees for the attendance of such children or exclude them from the school in default of paying fees.

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QUO WARRANTO.

Municipal election—Proceeding to unseat candidate declared elected —Municipal Act, R.S.M., 1902,

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c. 116, ss. 217, 218.]—The applicant and the respondent were both duly nominated as candidates for election as reeve of the municipality, when an objection that the applicant was a paid officer of the municipality, and therefore disqualified, was, contrary to the law as laid down in *Pritchard* v. *Mayor* of *Bangor*, (1888) 13 A.C. 241, given effect to by the returning officer and the respondent declared duly elected without any poll being taken.

Section 218 of the Municipal Act provides that a municipal election shall not be questioned on any of the grounds mentioned in section 217 except by an election petition under the Act.

Held, (CAMERON, J.A.), dissenting, that the applicant's complaint could not be said to be on the ground that the respondent "was not duly elected by a majority of lawful votes," and that, as none of the other grounds mentioned in section 217 could be taken, the applicant could not proceed by an election petition and should have leave to file an information in the nature of *quo warranto*.

The King v. *Beer*, [1903] 2 K.B. 693, followed.

The Queen v. *Morton*, [1892] 1 Q.B. 39, and *Harford* v. *Linskey*, [1899] 1 Q.B. 852, distinguished.

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REAL PROPERTY ACT,

1. *R.S.M.,1902, c. 148, s. 138—Caveat—Application in chambers to discharge.*]—An application to a Judge in chambers, under section 138 of The Real Property Act, R.S.M., 1902, c. 148, to discharge a caveat based on a *prima facie* valid document should not be entertained when the affidavits on both sides raise important issues as to disputed facts upon which the right to maintain the caveat depends.

Such issues cannot be properly determined upon the reading of conflicting affidavits.

The matter may be disposed of in chambers if the facts are practically undisputed, or otherwise clearly established, and the issue rests mainly on the interpretation, or validity, of the written document on which the caveat is grounded.

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2. *R.S.M. 1902, c. 148, ss. 71 and 91—Purchaser for value without notice—Concealed trust—Caveat—Parties to action.*] —*Held, per* ROBSON, J., in the court below:

(1) Under sections 71 and 91 of the Real Property Act, R.S.M. 1902, c. 148, a person who purchases land under an agreement of sale from the holder of a certificate of title under the Act without any notice or knowledge of any trust to which the land was subject in the hands of such holder, or of any other defect in the title, takes the land free from any such trust or defect and from all liability to any action at the suit of any person claiming an interest in the land as against the

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vendor and it makes no difference that he receives notice of the claim of such person before he has paid all his purchase money or received his transfer.

(2) If, therefore, in an action against the vendor charging fraud in his dealings with the land and a secret trust in the plaintiff's favor, such purchaser is made a party defendant, in respect of his agreement registered by way of caveat against the lands, he will be entitled to an order dismissing the action as against him with costs.

On the hearing of the appeal from the decision of ROBSON, J., above noted, it was alleged that one Orpen, not a party to the action, was interested in its subject matter and the Court deemed it advisable, without deciding the questions of law involved in the judgment, to vacate it and reinstate the action as it was before it was pronounced and allow all parties to amend as they might be advised.

Costs to be costs in the cause.

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RECOVERING BACK MONEY PAID.

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REGISTERED JUDGMENT.

1. *Verbal agreement to sell land —Statute of Frauds—Registry Act, R.S.M. 1902, c. 150, s. 72—Priority of unregistered equitable charge.*]—(1) Although a verbal agreement to sell land cannot be enforced in an action because of the 4th section of the Statute of Frauds, yet it is valid at common law, and the statute does not affect its validity but only the remedy upon it.

Leroux v. *Brown*, (1852) 12 C.B. 801, followed.

(2) If the judgment debtor has agreed to sell and convey his interest in land for valuable consideration before the registration of a certificate of the judgment, although such agreement is only a verbal one, he has no longer any interest in the land which can be bound by the registration, and the purchaser, who subsequently pays the purchase money and takes a conveyance from the judgment debtor, will take the land freed from any lien of the registered judgment.

Bank of Montreal v. *Condon*, (1896) 11 M.R. 366, and *Entwisle* v. *Lenz*, (1908) 9 W.L.R. 317, followed.

(3) Section 72 of the Registry Act, R.S.M. 1902, c. 150, does not give a registered certificate of judgment priority over a prior unregistered equitable charge.

Case v. *Bartlett*, (1898) 12 M.R. 280, followed.

Fenson v. *Shore*.....595

2. *Priority — Practice in the Master's office—Notice to incumbrancers.*]—By the judgment in this action dated 8th November, 1911, it was declared that the plaintiff had a lien, charge and incumbrance upon the lands in question for the sum of $11,613.04 and costs in priority to defendant's interests therein, and it was referred to the Master to take

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the usual proceedings for redemption or sale.

In the Master's office one Kelly was added as a party in respect of a judgment against the defendant registered on 11th March, 1910, and the usual notice to incumbrancers was served upon him.

This was an appeal by Kelly from the report of the Master refusing to give his claim priority over that of the plaintiff.

Held, that, when a party added in the Master's office claims priority over the plaintiff, the proper procedure is to move to discharge the order making him a party, or to add to, vary or set aside the judgment, and that, as the appellant had made no such motion, he was bound by the judgment in the same way as if he had been made a party originally and had suffered judgment to be recorded against him by default.

McDougall v. *Lindsay*, (1884) 10 P.R. 247, followed.

Held, also, that the appellant's judgment, being only a charge upon the defendant's interest in the lands, gave him no greater right than the defendant himself had, and, therefore, could not rank ahead of the plaintiff's claim which the judgment in the action, by which the appellant was bound, declared to be prior to the interest of the defendant.

Appeal dismissed with costs.

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3. *Realizing on—Land held by deed from judgment debtor absolute in form but only as security—Rights of purchaser from apparent owner—Power of sale—Notice—Costs*].—Action for sale of the interest of the defendant Smart in the lands in question to realize the amount of the plaintiff's registered judgment. Smart had, before the registration of the judgment, conveyed the land, subject to a prior mortgage, by a title absolute in form to the defendant Hinch but only as a security for debt. Two days before the registration of the plaintiff's *lis pendens* in this action, Hinch had assumed to sell the lands to the defendant Bonter, who paid a deposit of $55; but, before anything else was done towards completing his purchase, Bonter had full knowledge of the action.

Held, (1) That the interest of Smart was "land" within the meaning of The Judgments Act, R.S.M. 1902, c. 91, and could be sold to realize the amount of the plaintiff's judgment.

McCabe v. *Thompson*, (1857) 6 Gr. 175, and *Fitzgibbon* v. *Duggan*, (1865) 11 Gr. 188, distinguished.

(2) Hinch was a mortgagee without power of sale unless to a purchaser without notice.

Pearson v. *Benson*, (1860) 28 Beav. 598, followed.

(3) Plaintiff's rights were not affected by the attempted sale to Bonter, except to the extent of the money Bonter paid before the registration of the *lis pendens*.

(4) Plaintiff was entitled to redeem Hinch, or sell subject to his claim at his(plaintiff's) option.

(5) A judgment creditor, like any other subsequent incumbrancer, has the right to bring an action to sell the equity of redemption held by his judgment

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debtor without making the mortgagee a party; and, when a prior mortgagee holds by a title absolute in form, he may be made a party defendant without an offer to redeem: *Moore* v. *Hobson*, (1868) 14 Gr. 703.

For the directions as to costs, see the judgment.

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See NEGLIGENCE, 1.

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SALE OF GOODS.

Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, s. 3—Delivery—Change of possession.]—The claimant in this interpleader issue bought the stack of hay in question from the execution debtor without getting any bill of sale or other instrument in writing. The hay was on the premises occupied by the latter and was left there by the claimant. The execution debtor vacated the premises in a few days thereafter and the claimant procured the consent of the owner of the premises that the hay might remain where it was. About a month afterwards the plaintiff issued a writ of attachment under which the hay was seized while still on the same premises, and he obtained judgment and execution in due course.

Held, that there was not an immediate delivery of the hay, followed by an actual and continued change of possession, and that the sale was, therefore, void under section 3 of The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11.

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SOLICITOR AND CLIENT.

1. *Taxation of costs—Appeal from certificate of taxing officer—Bringing in objections—King's Bench Act, Rules 682, 684, 965 and 967—969.*]—Rule 682 of the King's Bench Act should be read along with paragraph (*d*) of Rule 965, and is the Rule to be applied in case of an appeal from the certificate of the taxation of costs between solicitor and client and not Rule 684.

The carrying in of written objections to items of the bill before the taxing officer as provided for in Rule 968, and the officer's reviewing the items so objected to under Rule 969, are necessary preliminaries to an appeal against the taxation of such items; but, where a question of principle is involved, written objections and review thereon are not necessary prior to appeal.

Re Robinson, (1896) 17 P.R. 137, and *Re Mowat*, (1896) 17 P.R. 180, referred to.

Re Phillipps & Whitla (*No. 1*).....150

2. *Costs—Taxation—Fee based on percentage of amount recovered by litigation—Allowance for proceedings out of Court to save costs or compromise actions.*]—Unless there is a contract between a solicitor and his client for a percentage or other mode of remuneration under section 65 of the Law Society Act, R.S.M. 1902, c. 95, the tariff of costs promulgated under Rule 990 of the King's Bench Act provides the only measure of a solicitor's remuneration for litigious business, and it is a wrong principle for the taxing officer to award the solicitor, in lieu of fees as provided for by the tariff, a single fee based on a percentage of the amount recovered or preserved for his client by means of an action in the Court, although the solicitor, by his successful efforts to procure a settlement, has secured to his client a considerable advantage.

A fee so based is not warranted under the provision in the tariff that an allowance may be made by the taxing officer in his discretion when "proceedings have been taken by solicitors out of Court to expedite proceedings, save costs or compromise actions."

Appeal from certificate of taxation allowed and bill referred back with liberty to the solicitors to deliver an amended bill with items according to the tariff, and a direction that the taxing officer allow a fee in respect of the settlement of the litigation under the clause in the tariff above quoted.

In re Richardson, (1870) 3 Ch. Ch. 144; *In re Attorneys*, (1876)

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26 U.C.C.P. 495, and *Re Johnston*, (1901) 3 O.L.R. 1, distinguished.

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TAXATION OF LAND.

Assessment Act, R.S.M. 1902, c. 117, ss. 13 and 31—Assessment of Provincial lands—"Unpatented" lands, what are—Provincial Lands Act, R.S.M. 1902, c. 135, s. 15—9 *Edward VII, c.* 36, *s.* 5—*Statutes, construction of.*]—1. Under sections 13 and 31 of The Assessment Act, R.S.M. 1902, c. 117, if land is in fact "unpatented," it is imperative that the assessment roll should so state and, without an entry therein to that effect, the proceedings towards taxation are so deficient that an action will not lie against the owner at the suit of the municipality to recover the taxes attempted to be levied.

Haisley v. *Somers*, (1887) 13 O.R. 600, followed.

2. Lands vested in the Crown in the right of the Province and being administered under the Provincial Lands Act, R.S.M., 1902, c. 135, although they have been acquired through a railway company from the Crown (Dominion) by letters patent or legislative grant, are to be deemed

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to be "unpatented" within the meaning of the Assessment Act until the issue of letters patent or a transfer under the Real Property Act by the Provincial Lands Commissioner, although they have been sold under agreement to the person assessed.

3. The statute 9 Edw. VII, c. 36, s. 5, legalizing and confirming all assessments made in rural municipalities for the years 1908 and 1909 which were based upon the assessment rolls for 1907, cannot be interpreted as legalizing an attempted assessment for such previous year not made in accordance with the law: *Endlich on Statutes*, par. 385.

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USURY.

Right of action to recover excessive interest paid—Money Lenders' Act, R.S.C. 1906, c. 122.]—An action lies at Common Law to recover interest paid by the borrower in excess of the legal rate.

Browning v. *Morris*, (1778) 2 Cowp. 791; *Smith* v. *Bromley*, 2 Doug. 696, and *Barnhart* v. *Robertson*, (1842) 6 O.S. 542, followed.

The Money Lenders' Act, R.S. C. 1906, c. 122, though it provides a remedy for the borrower when sued by the lender of money at an excessive rate of interest, does not take away the Common Law right of the borrower to sue for excessive interest paid, such remedy being only cumulative.

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VENDOR AND PURCHASER.

1. *Acceptance of offer—Action for account—Costs.*]—The defendant was the trustee member of a syndicate which had made a speculative purchase of real estate of which the purchase money was payable by instalments. The plaintiff was a member of the syndicate and the defendant sent him a letter offering to pay him

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$2,100 for his interest in the property or to sell to him his (defendant's) interest at the same price. Prior to sending this letter defendant had made a sale of part of the property but did not mention that fact in his letter. The letter requested a reply *by return mail* and, in closing, a *prompt* reply. The plaintiff's reply accepting the defendant's offer to sell was not communicated to the latter until 26 days after the defendant's letter should, in the ordinary course of the mails, have reached the plaintiff, and in the meantime the defendant had made a profitable sale of the balance of the property.

Held, that, considering the nature of the property, the terms of the offer and the surrounding circumstances fully set out in the judgment, the plaintiff was too late in communicating his acceptance of the offer to the defendant and that specific performance of the defendant's offer should be refused.

Held, also, that, as the defendant had furnished reasonably full statements of moneys received there should be no judgment against him for an account except a reference to the Master (if plaintiff desired it but at his own risk as to costs), to settle a few items of trifling amount.

The defendant was refused his costs as against the plaintiff because he had not informed the plaintiff about the sale of part of the property which he had made before sending his offer.

Kelley v. *Holley*.....601

2. *Agreement of vendor to convey—Incumbrance—Caveat filed after certificate of title under Real Property Act—Costs.*]—The defendant agreed to sell the land in question to the plaintiff's assignor and, upon payment of the purchase money, to convey the land "to the purchaser by a transfer under the Real Property Act or a deed without covenants other than against incumbrances by the vendor," and the purchaser agreed to accept the title of the vendor and that he should not be entitled to call for the production of an abstract of title or proof or evidence of title or any deeds, papers or documents relating to the said property other than those then in the possession of the vendor.

The defendant had a clear certificate of title for the property, except that there was indorsed upon the duplicate sent to him a caveat filed by one Latzke after the issue of the original certificate.

Held, that the plaintiffs were not entitled, upon tender of the balance of the purchase money, to demand from defendant a transfer free from the caveat of Latzke, for which the defendant was in no way responsible.

The defendant was deprived of the costs of the action although he succeeded, because, in his statement of defence, he said that he did not admit the alleged assignment to the plaintiffs, which was equivalent to denial of such assignment although he was well aware of it.

Cole v. *Cross*.....1

3. *Cancellation of agreement of sale for default in payment—*

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Forfeiture of money paid—Acceleration clause in agreement.]—A provision in an agreement of sale of land that, in the event of default being made in payment of any one of the instalments of principal stipulated for or of any interest, taxes or premiums of insurance or any part thereof, the whole purchase money shall immediately become due and payable, is one against which the Court can give no relief; and, upon any such default being made, the vendor is entitled to judgment for the full amount of the unpaid purchase money and, if the agreement so provides, for cancellation of the agreement and forfeiture of all payments made thereunder and of all improvements made by the purchaser on the land, in case payment of the unpaid balance of principal, interest and costs be not made within a time to be fixed by the Master.

Vosper v. *Aubert*, (1908) 18 M.R. 17; *Wallingford* v. *Mutual*, (1880) 5 A.C. at p. 705, and *McFadden* v. *Brandon*, (1904) 8 O.L.R. 610, followed.

Houghton v. *Nicoll*.....489

4. *Cancellation of agreement of sale for default by purchaser—Abandonment of purchase—Specific performance—Removal of caveat registered by purchaser—Laches—Declaration of forfeiture—Costs—Purchaser's right to return of money paid—Time as the essence of a contract.*]—Action by vendor of land under an agreement of sale for a declaration that the purchaser was in default and had abandoned his purchase and for the removal of a caveat registered by the purchaser.

The defendant denied abandonment and asked for specific performance of the agreement. He had made the initial payment on the land, but failed to pay the next instalment when due, whereupon the plaintiff purported to cancel the sale although there was no valid power to do so in the agreement. Defendant afterwards sent plaintiff the money for the overdue instalment and interest, but the plaintiff returned it to the defendant, saying that his claim on the lot "became void some months ago." Defendant then registered his caveat.

Nothing further was done in the matter until the commencement of this action over four years later.

Held, that the plaintiff was entitled to a declaration that the defendant's rights under the contract had been forfeited so far as the land was concerned and that he had, by his delay and laches, lost the right to specific performance or to claim damages for non-performance.

Mills v. *Haywood*, (1877) 6 Ch.D. 202, followed.

Whitla v. *Riverview Realty Co.*, (1910) 19 M.R. 746, referred to.

As far as appeared from anything brought forward at the trial, the plaintiff was not the registered owner of the land.

Held, that for this reason she was not entitled to an order for the removal of the defendant's caveat from the register in the Land Titles Office.

Held, also, that, when an agreement contains a clause that time is to be of the essence of the contract, a Court of Equity will give effect to that stipulation

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unless the party in default can show a sufficient excuse for non-compliance with it and that there was no unreasonable delay on his part, but will relieve against it if it can do justice between the parties and if there is nothing in their express stipulations, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right.

Tilley v. *Thomas*, (1867) L.R. 3 Ch. 67, followed.

Held, also, that, under such an agreement, a mere extension of the time given by the party entitled to performance is only a waiver to the extent of substituting the extended time for the original time and not a total destruction of the essential character of time.

Barclay v. *Messenger*, (1874) 43 L.J.Ch., *per* Jessel, M.R., at p. 456, followed.

It was not expressly decided whether the defendant was entitled to a return of the money he had paid on this purchase, but the order made by the trial Judge, following the view of Anglin, J., in *Labelle* v. *O'Connor*, (1908) 15 O.L.R. 519, that the plaintiff have costs on condition of crediting thereon the cash paid by defendant on the contract, less any money paid for commission on the sale and expenses incident to the agreement, was affirmed.

Hicks v. *Laidlaw*.....96

5. *Principal and agent—Misrepresentation—Rescission of contract.*]—Action to set aside a sale of land made to the defendants on the ground of alleged misrepresentations made by the defendant Russell and of concealment by Russell of certain facts known to him which, if made known to the plaintiffs, would have caused them to hold the property for a much higher price. It appeared that Russell, who was in some way connected with the real estate firm of C. H. Enderton & Co., approached the plaintiffs with a view to securing from them an option on the property, saying that he was acting for one Bell, who wanted to buy it. Plaintiffs signed an option of sale to C. H. Enderton & Co. for the price agreed on and agreed to allow that firm a "commission" of $1,000 on the sale, although they were not plaintiffs' agents for making the sale. The sale was afterwards carried out and the conveyance made to the defendant Simpson, the nominee of Russell who provided the necessary funds. The $1,000 was deducted from the cash payment made to plaintiffs, and Enderton & Co. allowed Russell the benefit of the $1,000 commission.

Held, RICHARDS, J.A., dissenting, that there was nothing in what had taken place to constitute Russell the plaintiffs' agent for the sale of the property or to create any fiduciary relationship between them and him, and that the plaintiffs could not have the sale set aside by reason of any concealment by him of any facts tending to enhance the value of the property or by reason of his alleged untruthful statement to the plaintiffs, when

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he was negotiating for the option, that he knew of no such facts.

Per PERDUE, J.A.—When a conveyance of the land has been executed and delivered, nothing in the way of misrepresentation short of actual, positive fraud will warrant a judicial rescission between vendor and purchaser, and the mere concealment of the name of the real purchaser will not be sufficient, even if the vendor would not have sold if he had known who the real purchaser was.

Fellowes v. *Gwydyr*, (1826) 1 Sim. 63; *Bell* v. *Macklin*, (1887) 15 S.C.R. 576, and *Brownlie* v. *Campbell*, (1880) 5 A.C. 925, followed.

Kelly v. *Enderton*.....277
[Affirmed, 1913 A.C. 191.]

6. *Rescission of contract — Abandonment—Laches — Time of the essence of the contract—Intent proof of—Appeal from Judge's finding of fact.*]—A contract under seal may be validly rescinded in equity without an instrument under seal, and a contract of rescission may be inferred from acts of the parties amounting to an abandonment on one side and an acceptance of the abandonment on the other.

A purchaser of land under agreement of sale providing for payment by monthly instalments and that time should be of the essence of the contract, who, after defaulting in his payments, allows nearly four years to elapse without doing anything towards re-instating the contract, beyond urging the vendor to sell the property so that he could get back the money he had paid, or showing any intention to make further payments, should be held to have abandoned it.

Howe v. *Smith*, (1884) 27 Ch. D. 95, followed.

In such a case, when the vendor has accepted and acted on the abandonment by re-selling the property or otherwise, the original contract is at an end and the purchaser can recover neither damages as for a breach of it by the vendor refusing to accept a subsequent tender of the overdue amount, made only after an increase in the value of the property, nor the money he has paid.

Cornwall v. *Henson*, [1900] 2 Ch. 298, distinguished.

Whether or not a purchaser has intended to abandon his purchase should be determined from the facts and circumstances in evidence and not from his own interested statements afterwards made.

The Court reversed the trial Judge's finding of fact that the contract in question still subsisted; holding that the question of intention could be decided by a Court of review as well as by the trial Judge who had heard the witnesses.

Handel v. *O'Kelly*.....562

7. *Sale of land subject to highway—Time as the essence of the contract.*] — The agreement in question provided that the defendant should have the privilege, at any time within one year from its date, of transferring to the plaintiff a half section of land with a clear title, in lieu of payment of $6400 in cash due at the end of the year on the defendant's pur-

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chase of the property in question. The defendant's certificate of title to the half section excepted out of it eight acres for a public highway, and he was unable to get in title for the eight acres until after the expiration of the year.

Held, that the plaintiff was not bound to accept title to the half-section subject to the highway, that the defendant was not entitled to a reasonable time after the end of the year to remove the defect and that the plaintiff was entitled to judgment for the $6400 in cash besides the other money due under the agreement.

Vanderlip v. *Peterson*, (1906) 16 M.R. 341, and *Paterson* v. *Houghton*, (1909) 19 M.R. 168, followed.

Bergman v. *Cooke*..... 435

8. *Specific performance—Agreement of sale—Reference to more formal contract to be subsequently prepared—Statute of Frauds.*] —A receipt given by the vendor's agents to the purchaser for the cash deposit on the sale of land subject to the approval of the vendor, if it contains all the terms of the contract and is sufficiently executed to satisfy the Statute of Frauds, and if the sale is subsequently approved by the vendor, will be binding on him and the purchaser will be entitled to enforce specific performance notwithstanding the provision: "$1500 to be paid in cash *on execution of the necessary agreement of sale*," in the receipt and that there was no more formal agreement of sale executed afterwards.

Von Hatzfeldt v. *Alexander*, [1912] 1 Ch. 289; *Winn* v. *Bull*, 7 Ch. D. at 32; *Rossiter* v. *Miller*, 3 A.C. 1124, and *Munroe* v. *Heubach*, 18 M. R. 450, followed.

The signing of the receipt by the agents as "Agents for owner" was sufficient to satisfy the Statute of Frauds, although the name of the owner was not stated in it.

Rossiter v. *Miller*, 3 A.C. at p. 1140, followed.

Conley v. *Paterson*..... 127

9. *Specific performance—Land out of the jurisdiction—Purchaser with notice—Jurisdiction—Judgment in personam—Torrens title—Damages—Statute of Frauds—Evidence.*] —The defendant Ernst sold the land in question, which was in Ontario, to the plaintiff by an agreement of sale which provided that, on the completion of the several payments, the land would be conveyed by a Torrens title to the plaintiff. After plaintiff had paid some of the instalments, the defendant Just took over the land from Ernst subject to the plaintiff's rights and notified the plaintiff of this and promised that, if the plaintiff would complete his payments, he, Just, would give him a Torrens title.

Held, (CAMERON, J.A., dissenting), (1) This promise of Just was not "a contract or sale of lands, tenements or hereditaments, or any interest in or concerning them," but was a collateral agreement which might be proved by parol evidence and enforced notwithstanding the 4th section of the Statute of Frauds.

Jeakes v. *White*, (1851) 6 Ex

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873; *Angell* v. *Duke*, (1875) L.R. 10 Q.B. 174, and *Boston* v. *Boston*, [1904] 1 K.B. 124, followed.

(2) The trial Judge was right in awarding judgment for specific performance against Just and damages for his failure to procure a Torrens title, such damages to be the amount ascertained by the Master on a reference to be the cost of obtaining such title.

Held, also, that the Court had jurisdiction to decree specific performance of Ernst's agreement to convey the land against Just, since he obtained his title from Ernst after the plaintiff's purchase and with full notice of it

Held, also, *per* RICHARDS, PERDUE, and HAGGART, JJ.A., (1) The Court has also power to enforce specific performance in respect of lands out of the jurisdiction by a judgment *in personam* when the party resides within the jurisdiction.

(2) Sections 7 and 9 of the Statute of Frauds do not prevent relief being granted to the purchaser in such a case, because the vendor's alienee puts himself in the position of a trustee of the land for the purchaser, and cannot be permitted to avail himself of the Statute in order that he may commit a fraud.

Rochefoucauld v. *Boustead*, [1897] 1 Ch. 206, and *Haigh* v. *Kaye*, (1872) L.R. 7 Ch. 474, followed.

Smith v. *Ernst* (No. 2) 363

10. *Subsequent mortgage by vendor—Tender — Specific performance.*] — When a purchaser of land, under an agreement of sale, gets notice of a mortgage on the land created by the vendor, subsequently to the sale, but before all payments have been made, his remaining payments should be made to the mortgagee and not to the vendor, otherwise he may have to make the payments over again.

Dart on V. & P. vol. 2, p. 386, and *Rayne* v. *Baker*, (1859) 1 Giff. 241, followed.

The plaintiff in this action asked for specific performance of the defendant Well's agreement to sell him the land in question. He had tendered to the defendant's agent a sum which fell short by only $2.20 of the correct amount, $167, payable by him for a conveyance, but this was refused.

Held, that, under the circumstances of this case as set out in the judgment, the maxim "*de minimis non curat lex*" should be applied, and so trifling a shortage should not preclude the granting of the relief sought, especially as plaintiff had paid Wells $191.75, which should have been paid to the mortgagee.

Gillespie v. *Wells* 355

See FRAUD.

See JURISDICTION.

VERBAL AGREEMENT TO SELL LAND.

See REGISTERED JUDGMENT, 1.

VOIDABLE CONTRACT.

See INFANT, 2.

VOLUNTARY SETTLEMENT.

See FRAUDULENT CONVEYANCE.

WAIVER.

See CONTRACT, 2.

See DAMAGES, 3.

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WARRANTY.

See LIFE INSURANCE, 1.

WELL.

See LANDLORD AND TENANT.

WHEN CAUSE AT ISSUE.

See PRACTICE, 1.

WILL.

Misnomer—Mistake in name of legatee—Extrinsic evidence of intention of testator.]—The testator's will left a legacy to the "Old Peoples' Home, being a charitable institution carried on at or near Winnipeg."

There was no institution of that name at or near Winnipeg, but there was The Old Folks' Home at Middlechurch, a place a few miles north of the city, and also an institution at St. Boniface near Winnipeg called La Maison des Vieux or, in English, Old Peoples' Home or Old Folks' Home. The former institution was managed by a board largely composed of members of the Presbyterian Church to which the testator belonged and he had frequently contributed money to its support and had expressed his intention to remember it in his will, whereas the other institution was managed by the Roman Catholic Church and it did not appear that the deceased had ever contributed to its support or even known of its existence.

Held, that the testator must have intended the legacy for the Old Folks' Home and it should be paid to that institution.

British Home and Hospital for Incurables v. *Royal Hospital for Incurables*, (1904) 90 L.T. 601, referred to.

Re Thomas Douglas Smith, Deceased. 756

See EXECUTORS AND TRUSTEES.

See LIFE INSURANCE, 2.

WINDING UP.

1. *Contributories—Payment for shares otherwise than in cash—Attempted cancellation of shares by company—Consideration for allotment of shares as fully paid—Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, s. 48*] — Application of the liquidator in the winding up of the company, which had been incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, to settle one Wallace on the list of contributories in respect of two allotments of 10 and 200 shares respectively of the nominal value of $100 each.

The alleged consideration given by Wallace for the 10 shares was his interest as one of a syndicate of ten persons in a patent for improvements in hedge fences; but, before there was any resolution of the company to purchase the patent rights, it was known that the invention was not likely to prove successful and there was no satisfactory evidence that there had been such an assumption or user of the patent rights by the company that any obligation to pay for same could be implied against the company, or that a formal assignment of the patent rights had ever been given to the company.

Held, that Wallace should be

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settled on the list in respect of these 10 shares.

Re Jones & Moore Electric Co., (1909) 18 M.R. 549, followed.

The syndicate of which Wallace was a member had, for two years after the incorporation of the company, carried on the business independently of the company, until, in 1904, a certificate was issued to Wallace for the syndicate for 200 paid up shares in consideration of certain alleged outlays by the syndicate while they had been carrying on the business, and of the transfer to the company of some assets of trifling value.

Held, that no reason had been shown why the company should recoup the syndicate for the alleged outlay, and that the other considerations for the shares were so grossly inadequate that the procuring of their issue was a fraud on the company, and that Wallace should also be settled on the list for the 200 shares less 10 transferred by him previously.

A transfer of shares to the company for cancellation is entirely ineffectual to do away with the liability of the shareholder in respect of such shares.

Smith v. *Gowganda Mines Ltd.*, (1911) 44 S.C.R. 621, followed.

The fact that the certificate for the 190 shares was issued to Wallace as "Trustee for Syndicate" was held not to affect his personal liability as a shareholder under section 48 of the Act, which only applies to a trustee who represents an estate: *Masten's Company Law*, p. 136.

Re Winnipeg Hedge & Wire Fence Co. 83

2. *Insolvency — Winding-Up Act, R.S.C. 1906, c. 144, ss. 3, 15 —Evidence—Affidavit on information and belief—Acknowledgment of insolvency — One-man company.*]—1. A winding-up order under the Winding-Up Act, R.S.C. 1906, c. 144, finally determines the rights of the parties within the principle laid down in *Gilbert* v. *Endean*, (1878) 9 Ch.D. 259, and a petition for such an order cannot be supported by statements on information and belief.

2. The production by the Company of its books of account to an auditor employed by the creditors does not amount to the *exhibiting of a statement showing its inability to meet its liabilities*, so as to bring the Company within section 3 of the Act, although such auditor swears that, from his examination of the books and from information derived from the President, he came to the conclusion that the Company was hopelessly insolvent, and that the President admitted to him that the Company was insolvent.

The petitioners sought to show that the Company had "otherwise acknowledged its insolvency," and proved that the President, who was also the manager of the Company, had made such an acknowledgment.

Held, that such acknowledgment was not the acknowledgment of the Company required by clause (d) of section 3 of the Act. There must be some formal act of the directors or of the shareholders or of some officer expressly or impliedly authorized to make such an acknowledg-

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ment on the Company's behalf, and nothing of the kind was shown in this case.

Re Qu' Appelle Valley Farming Co., (1888) 5 M.R. 160, and *Parker & Clark's Company Law*, 351, followed.

The president of the Company, when examined on his affidavit filed in opposition to the petition, stated that he was then the only person beneficially interested in the Company, but it appeared that there were at one time four other shareholders, holding one share each as against his 196.

Held, that, as against those other shareholders, although their interest, if any, was small, the statement of the president was not evidence and could not be accepted, and therefore it was not established that he was the sole beneficial owner of all the shares and the Company must be deemed to be a real, and not a sham, entity, and could not be dealt with as a one-man company.

Held, also, that section 15 of the Act only applies in a case where the petitioners have made such a *prima facie* case of insolvency as would justify a winding-up order and that, as the petitioners had failed to do this, the Court could not make an order under that section adjourning the application and for an inquiry into the affairs of the Company by an accountant, although it had opposed the petition on the ground that it had not become insolvent.

Re Manitoba Commission Company.....268

See MORTGAGOR AND MORTGAGEE

WORKMEN'S COMPENSATION ACT, 1910.

Injury arising out of and in the course of the employment—Death resulting from the injury.]— The deceased was a workman in the employ of the defendants. He lived across the street from the school where he worked. Part of his work was to feed furnaces with sticks of cordwood. In the morning of the day of his injury his wife saw him go from his house to the school in his usual good health. Later in the morning she saw him come out and return home. As he came out she noticed that he walked as if in pain and held his hand against his body.

It was found that he was suffering from a fresh rupture or hernia.

Held, that there was sufficient evidence, apart from the statements of the deceased to his wife and the doctor, to show that the injury arose "out of and in the course of the employment," within the meaning of the Workmen's Compensation Act, 1910.

Mitchell v. *Glamorgan Coal Co.*, (1907) 23 Times L.R. 588, followed.

The physician who attended the deceased discovered that the deceased had an old hernia on the side opposite to the fresh one and advised him to be operated on for both at the same time. The deceased consented and the double operation was performed with apparent success; but, within 48 hours after, a virulent form of blood poisoning developed in both wounds causing his death a few days later.

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There was nothing to show that the blood poisoning was caused exclusively by the operation for the cure of the old hernia.

The County Court Judge awarded the plaintiffs under the Act $1500 compensation for the death.

Held, that this award involved a finding that the infection got into the deceased through the wound caused by the operation for the new hernia, that there was evidence to justify such finding and the further finding that the death had resulted from the fresh hernia.

Dunham v. *Clare*, [1902] 2 K.B. 292, and *Ystradowen* v. *Griffiths*, [1909] 2 K.B. 533, followed.

Appeal dismissed and award sustained.

Eddles v. *School District of Winnipeg No. 1*..... 240

WORDS.

"Successful party" in an appeal. *See* COSTS, 2.

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